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Recommended Citation

Carroll E. Neesemann, *The Law of Unseaworthiness and the Doctrine of Instant Unseaworthiness*, 28 Md. L. Rev. 249 (1968)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol28/iss3/5>

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Notes and Comments

THE LAW OF UNSEAWORTHINESS AND THE DOCTRINE OF INSTANT UNSEAWORTHINESS

A shipowner has an absolute duty to certain persons working upon his ship to furnish a seaworthy vessel, that is, a ship and its appurtenances reasonably fit for their intended use. If the ship is unseaworthy, the shipowner is liable for personal injury caused by such unseaworthiness to persons to whom the "warranty" extends. It is the purpose of this Comment to examine generally the development and present state of the law of unseaworthiness as it pertains to liability for personal injury, with particular emphasis on the doctrine of instant unseaworthiness. First, the unseaworthiness remedy will be placed in the context of other personal injury remedies available to persons covered by the doctrine. Policy reasons advanced for the development of the law of unseaworthiness will then be observed. With these considerations in mind, the expansion of the coverage of the unseaworthiness remedy will be examined. Finally, the act-condition distinction of the doctrine of instant unseaworthiness and the effect of puzzling recent Supreme Court cases upon it will be analyzed, hopefully with some measure of predictive reliability.

REMEDIES FOR PERSONAL INJURY

The law concerning the right to recover damages for personal injury caused by unseaworthiness has developed almost completely as a matter of general, judge-made, maritime law.¹ Such recovery

1. The general maritime law provides no right to a jury trial when suit is brought solely on a claim of unseaworthiness. *Considine v. Black Diamond S.S. Corp.*, 163 F. Supp. 109 (D. Mass. 1958). A plaintiff suing for damages for injuries caused by unseaworthiness can, however, procure a jury trial on the issue of unseaworthiness if he can establish diversity of citizenship and an adequate amount in controversy, *see Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); 28 U.S.C. § 1332 (1964), or if his unseaworthiness claim is joined with a claim of negligence under the Jones Act, *see Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). Jury trials can also be obtained under a federal statute in cases in which injury has occurred on certain types of ships upon United States lakes and navigable waters between lakes. 28 U.S.C. § 1873 (1964).

The general maritime law, in the absence of statutes of limitation, applies the doctrine of laches to bar actions marked by an unexcused delay in bringing suit, if such delay has caused prejudice to an opposing party. *M. NORRIS, MARITIME PERSONAL INJURIES* § 78, at 195-97 (2d ed. 1966). The various statutes applied to maritime injury and death cases carry their own limitation provisions: Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 913(a) (1964) (generally one year to file claim, though subject to exceptions); Federal Employers' Liability Act, 45 U.S.C. § 56 (1964) (three years); Jones Act, 46 U.S.C. § 688 (1964) (incorporating F.E.L.A. by reference); Suits in Admiralty Act, 46 U.S.C. § 745 (1964) (two years); Death on the High Seas Act, 46 U.S.C. § 763 (1964) (generally two years, but subject to exceptions); Public Vessels Act, 46 U.S.C. § 782 (1964) (two years). The time for bringing actions for personal injury caused by unseaworthiness has not been limited by statute, except in suits against the United States, *see Suits in Admiralty Act*, 46 U.S.C. § 745 (1964) (two years); *Public Vessels Act*, 46 U.S.C.

may be claimed against a vessel in rem² or against a shipowner³ or bareboat charterer⁴ in personam. Unlike unseaworthiness liability for damage to cargo,⁵ unseaworthiness liability for personal injuries has, in general, not been restricted by statute.⁶ The unseaworthiness remedy is available to seamen and certain harbor workers.⁷ Injured seamen may also use the remedy provided by the Jones Act,⁸ which makes an employer liable, in personam,⁹ for the personal injury or death¹⁰ of an employee seaman caused by *negligence* attributable to

§ 782 (1964) (same), and thus an action against some other defendant is barred by delay only when such delay causes the doctrine of laches to come into play, *White v. United States Lines Co.*, 254 F. Supp. 480 (D. Md. 1965). Actions for personal injury caused by unseaworthiness, however, like other maritime actions, may be subject to certain statutory limitations on the amount of recovery. Generally recovery is limited to the value of the ship or the owner-defendant's interest in it. *Grillea v. United States*, 232 F.2d 919, 923 (2d Cir. 1956); *Limitation of Liability Act*, 46 U.S.C. § 181-95 (1964). See also G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* ch. 10 (1957); M. NORRIS, *MARITIME PERSONAL INJURIES* ch. 7 (2d ed. 1966).

2. *Reed v. The Yaka*, 373 U.S. 410 (1963) (despite bareboat charter); *The Osceola*, 189 U.S. 158 (1903) (dictum); cf. *The State of Maryland*, 85 F.2d 944 (4th Cir. 1936) (suit in rem for analogous duty to warn of dangerous propensities of machinery). But see *Suits in Admiralty Act*, 46 U.S.C. § 741 (1964) (arrest or seizure by judicial process not allowed of vessel owned by United States); *Public Vessels Act*, 46 U.S.C. § 788 (1964) (no lien against vessel owned by United States).

3. *The Osceola*, 189 U.S. 158 (1903) (dictum); *Considine v. Black Diamond S.S. Corp.*, 163 F. Supp. 109 (D. Mass. 1958). The United States has allowed admiralty suits to be brought against itself in personam in regard to its vessels where such suits could have been brought had the vessels been privately owned, 46 U.S.C. § 742 (1964), but in such cases the provisions of the *Suits in Admiralty Act*, 46 U.S.C. §§ 741-52 (1964), and the *Public Vessels Act*, 46 U.S.C. §§ 781-90 (1964), control the litigation.

4. *Reed v. The Yaka*, 373 U.S. 410 (1963). A bareboat or demise charterer is one who charters or leases a vessel for a period of time during which he directs the operations of the vessel, controls its movements, employs its master and crew, and pays its operating expenses. Unseaworthiness liability does not attach to a time charterer, *Considine v. Black Diamond S.S. Corp.*, 163 F. Supp. 109 (D. Mass. 1958), or voyage charterer, who does not control the operations of the ship but merely orders its master to carry certain cargo on certain voyages, does not employ the ship's master or crew, and does not pay operating expenses. M. NORRIS, *MARITIME PERSONAL INJURIES* § 85, at 212 (2d ed. 1966).

5. Unseaworthiness liability for cargo damage has been restricted by the *Harter Act*, 46 U.S.C. §§ 190-95 (1964), and by the *Carriage of Goods by Sea Act*, 46 U.S.C. §§ 1300-15 (1964).

6. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) (discussing *Harter Act*).

7. See notes 98-118 *infra* and accompanying text.

8. 46 U.S.C. § 688 (1964).

9. There is no liability in rem under the Jones Act. *Plamals v. Pinar Del Rio*, 277 U.S. 151 (1928), *overruled on other grounds*, *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

10. The general maritime law has provided no right of recovery for wrongful death in the absence of statute. *The Tungus v. Skovgaard*, 358 U.S. 588 (1959); *Lindgren v. United States*, 281 U.S. 38 (1930). The Jones Act has provided such a remedy, but only for the death of a seaman caused by the negligence of his employer. See *Jones Act*, 46 U.S.C. § 688 (1964), incorporating by reference, *Federal Employers' Liability Act*, 45 U.S.C. § 51 (1964). The Jones Act has been construed as not providing a remedy for death caused by unseaworthiness, *Lindgren v. United States*, 281 U.S. 38 (1930); *Doyle v. Albatross Tanker Corp.*, 260 F. Supp. 303 (S.D.N.Y. 1965); *Holland v. Steag, Inc.*, 143 F. Supp. 203 (D. Mass. 1956), and as precluding state statutory death remedies in favor of those provided by the Act, *Lindgren v. United States*, *supra*; *Holland v. Steag, Inc.*, *supra*. The Death on the High Seas Act, 46 U.S.C. §§ 761-68 (1964), has provided a remedy for the wrongful death of any person on the high seas. It has been construed to provide a remedy for death by unseaworthiness, *Doyle v. Albatross Tanker Corp.*, 260 F. Supp. 303 (S.D.N.Y. 1965), but it is applicable only to deaths on the high seas beyond one marine league (three nautical miles), M. NORRIS, *MARITIME PERSONAL INJURIES* § 109, at 249 n.12 (2d ed. 1966), from shore, 46 U.S.C. § 761 (1964), and does not

the employer.¹¹ The Act incorporates by reference the liberal provisions of the Federal Employer's Liability Act¹² governing liability of employers for the personal injury and death of railroad workers.

In addition to, and independent of,¹³ his possible right to recover for unseaworthiness or under the Jones Act:

The seaman when sick or injured in the service of the vessel without willful misbehavior on his part, is entitled to the remedy of maintenance and cure, *i.e.*, wages to the end of the voyage and subsistence, lodging and care to the point where the maximum cure attainable has been reached. . . . The right to maintenance is not dependent on the fault of the shipowner or absence of fault on the part of the seaman.¹⁴

As indicated in the foregoing quotation, the remedy of maintenance and cure provides no recovery for pain and suffering and only limited recovery of lost "wages."

The *harbor worker* has no right to maintenance and cure or to an action for damages under the Jones Act.¹⁵ The Longshoremen's and Harbor Workers' Compensation Act¹⁶ has provided for pay-

apply to marine deaths upon the Great Lakes or other inland waterways, M. NORRIS, *supra* § 109, at 249. The Act provides recovery only for the pecuniary loss to a limited class of beneficiaries and does not provide recovery for the conscious suffering of the deceased prior to death. M. NORRIS, MARITIME PERSONAL INJURIES § 135, at 352-53 (2d ed. 1966). The Supreme Court has not decided the issue, but the lower federal courts agree that a seaman's personal representative can sue for wrongful death under either the Jones Act or the Death on the High Seas Act. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-30, at 304 (1957). The Longshoremen's & Harbor Workers' Compensation Act provides for compensation for death within or without a marine league from shore and upon any navigable waters of the United States, but it applies only to longshoremen and other harbor workers. 33 U.S.C. § 903 (1964). It allows recovery only to a limited class of beneficiaries. 33 U.S.C. § 909 (1964). In cases of marine death not covered by these statutes, state statutory remedies have been allowed, *see, e.g.*, *The Tungus v. Skovgaard*, 358 U.S. 588 (1959); *Holley v. The Manfred Stansfield*, 186 F. Supp. 212 (E.D. Va. 1960), but when such state statutory remedies for wrongful death are applied to maritime cases, defenses that are not available under the general maritime law, *see* notes 31-35 *infra* and accompanying text, but that are incorporated by the state statute, are nevertheless applied to maritime cases and operate to bar recovery when applicable, *The Tungus v. Skovgaard, supra*.

In the case of death caused by personal injury suffered in the course of employment, the Jones Act provides recovery for the suffering of the deceased before death as well as for pecuniary loss to relatives, but restricts recovery to a specific class of beneficiaries, M. NORRIS, MARITIME PERSONAL INJURIES § 134, at 347-50 (2d ed. 1966), and its remedy is restricted, as in wrongful death, to injury of a seaman caused by the negligence of his employer. The Jones Act does not provide for survival of personal injury actions where death was not caused by the tort causing injury. *See* 45 U.S.C. §§ 51, 59 (1964); 46 U.S.C. § 688 (1964). The Longshoremen's & Harbor Workers' Compensation Act also provides for the survival of claims for the benefit of certain persons. 33 U.S.C. § 908(d) (1964). In other cases of marine personal injury, the survival of causes of action has been allowed under state statutes. *E.g.*, *Holland v. Steag, Inc.*, 143 F. Supp. 203 (D. Mass. 1956).

11. The Supreme Court has stated that if both unseaworthiness and Jones Act negligence claims are to be brought, they must both be brought in the same action. *McAllister v. Magnolia Petro. Co.*, 357 U.S. 221, 224-25 (1958).

12. 45 U.S.C. § 51 (1964).

13. *Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928).

14. M. NORRIS, MARITIME PERSONAL INJURIES § 13, at 24 (2d ed. 1966).

15. M. NORRIS, MARITIME PERSONAL INJURIES § 13, at 23 (2d ed. 1966). The Act applies only to seamen.

16. 33 U.S.C. §§ 901-50 (1964).

ment of compensation to longshoremen and other harbor workers for death or disability resulting from injury occurring on navigable waters of the United States (including drydocks). However, compensation under this Act is denied to a harbor worker whose injury is caused by his own intoxication or willful intention to injure or kill himself or another.¹⁷ The Act also provides that its compensation remedy is exclusive and precludes actions against employers, unless an employer fails to secure the compensation remedy.¹⁸ The Act provides, however, that an injured harbor worker may maintain a tort action against any third-party tort-feasor who is responsible for his injury.¹⁹ In such third-party tort actions harbor workers have been allowed to recover from shipowners for injury caused by negligence,²⁰ by negligent failure to provide a safe place to work,²¹ and by unseaworthiness.²²

The courts have found an "implied warranty of workmanlike service" in contracts made for the benefit of ships.²³ Such an implied warranty gives the shipowner a right of indemnity against the party primarily responsible for an injury which has given rise to the liability of the shipowner. Despite the exclusive remedy provision of the Longshoremen's and Harbor Workers' Compensation Act,²⁴ injured harbor workers have been allowed to recover from shipowners, and shipowners have been allowed to recover over against bareboat charterers²⁵ and independent contractors,²⁶ even where these ultimately liable parties were the employers of the injured harbor workers. Indeed, in apparent contravention of the statute, the Supreme Court has allowed a harbor worker to recover directly from his own employer for injury caused by unseaworthiness where the employer was also the shipowner.²⁷ Thus, an injured harbor worker has a com-

17. 33 U.S.C. § 903 (1964).

18. 33 U.S.C. § 904 (1964).

19. 33 U.S.C. § 933 (1964).

20. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 413-14 (1953), the Supreme Court stated that *The Osceola*, 189 U.S. 158 (1903), which denied recovery from a shipowner for injury caused aboard ship by the master or other crew member, only applied to injured seamen and did not bar recovery for injury caused by negligence to anyone not a seaman. In *Hawn* the injured plaintiff was a repairman employed by an independent contractor; he was allowed to recover for injuries caused by a bareboat charterer's negligence and by unseaworthiness. In such a case a bareboat charterer is treated the same as a shipowner.

21. See M. NORRIS, *MARITIME PERSONAL INJURIES* § 40, at 83-87 (2d ed. 1966).

22. See notes 98-115 *infra* and accompanying text.

23. See *Italia Società per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964) (indemnity though equipment supplied by stevedore *latently* defective); *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421 (1960) (indemnity even though stevedore negligence only calls ship's unseaworthiness into play and even though there was no privity of contract between shipowner and stevedore, on theory that ship is implied third-party beneficiary of stevedoring contract); *Crumady v. The J.H. Fisser*, 358 U.S. 423 (1959) (indemnity despite lack of privity); *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958) (indemnity despite fault of shipowner); *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) (negligence of contractor's employee).

24. 33 U.S.C. § 904 (1964).

25. *Reed v. The Yaka*, 373 U.S. 410 (1963) (in rem).

26. *E.g.*, *Italia Società per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

27. *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967).

pensation remedy against his employer and a negligence or unseaworthiness remedy against any third-party tort-feasor,²⁸ or his own employer if the employer is also the shipowner.

Other persons, such as passengers²⁹ or visitors,³⁰ who are not crew members or harbor workers but who are rightfully aboard ship are denied recovery for unseaworthiness but may recover for negligent failure to provide reasonably safe premises.

Various defenses available at common law are unavailable in admiralty. Though a seaman is said to assume the risks of his calling,³¹ he does not assume the risk of unseaworthy conditions. Thus, assumption of risk is not a defense to liability for unseaworthiness.³² Nor is the common law fellow-servant doctrine a defense to unseaworthiness liability.³³ The common law defense of contributory negligence has been adopted by the maritime law only in the form of "comparative negligence"; thus contributory negligence does not serve as a bar to recovery in admiralty, but operates only in mitigation of damages,³⁴ although mitigation may apparently be total in a proper case.³⁵ These common law defenses are denied application, and the comparative negligence device has been adopted in suits under the Jones Act,³⁶ the Longshoremen's and Harbor Workers' Compensation Act,³⁷ and the Death on the High Seas Act.³⁸

POLICY REASONS FOR THE SPECIAL TREATMENT OF SEAMEN AND HARBOR WORKERS

Courts have followed a policy of giving seamen treatment more favorable than that given other workers or people in general. This special treatment has been evidenced by a policy of construing statutes

28. This includes a suit in rem against a vessel for unseaworthiness. See *Reed v. The Yaka*, 373 U.S. 410 (1963).

29. See M. NORRIS, MARITIME PERSONAL INJURIES §§ 86-107, 110 (2d ed. 1966).

30. See *Id.* § 108, at 247-49. See also notes 109-10 *infra* and accompanying text.

31. *The Arizona v. Anelich*, 298 U.S. 110 (1936); *Rush v. Cargo Ships & Tankers, Inc.*, 360 F.2d 766 (2d Cir. 1966).

32. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 n.11 (1946); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *The Arizona v. Anelich*, 298 U.S. 110 (1936).

33. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Skibinski v. Waterman S.S. Corp.*, 360 F.2d 539 (2d Cir. 1966); cf. *The State of Maryland*, 85 F.2d 944 (4th Cir. 1936) (no defense to analogous duty to warn of dangerous propensities of machines).

34. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 429 (1939); *Grillea v. United States*, 232 F.2d 919 (2d Cir. 1956).

35. *Donovan v. Esso Shipping Co.*, 259 F.2d 65 (3d Cir. 1958) (allegedly unseaworthy condition caused solely by the negligence of the injured party). See text accompanying notes 151-55 *infra*.

36. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939) (contributory negligence serves only to mitigate damages); *The Arizona v. Anelich*, 298 U.S. 110 (1936) (assumption of risk no defense); 45 U.S.C. § 51 (1964); 46 U.S.C. § 688 (1964).

37. The defenses of assumption of risk, the fellow-servant doctrine, and contributory negligence do not apply at all to the compensation remedy. In suits brought under the Act against employers failing to secure compensation, the defenses do not operate to bar recovery, and contributory negligence operates only in mitigation of damages. 33 U.S.C. § 904-05 (1964).

38. 46 U.S.C. § 766-68 (1964).

liberally in their favor,³⁹ by the restriction of defenses to their suits,⁴⁰ and by the expansion of the scope of liability for unseaworthiness.⁴¹ The courts have justified this special treatment on three major grounds: the characterization of seamen as men unable to take care of themselves very satisfactorily; the especially hazardous nature of their profession; and the desire to spread loss throughout the shipping industry through the medium of insurance.

The seaman has traditionally been known as the "ward of the admiralty."⁴² He has been looked upon sympathetically as ignorant, helpless, and in need of protection even from himself.⁴³ This characterization has been used to justify special treatment. The nature of the calling has also been used as a justification for liberal treatment of seamen. The rigid discipline of shipboard life,⁴⁴ the inability to leave ship at sea or even in port without incurring sanctions,⁴⁵ and the particularly hazardous nature of the profession,⁴⁶ especially since the advent of steam,⁴⁷ have been offered as peculiar characteristics of the trade requiring special treatment. It has been widely felt that it is unfair to put the loss of such a hazardous trade upon seamen, those least able to bear it financially. It is argued that it is better to distribute the loss among the users of the shipping industry through the medium of insurance, the cost of which is ultimately reflected in the price of shipping services. It is the shipowner and those in a similar position that have been chosen as those best situated to purchase the insurance.⁴⁸ It is also argued that the placing of the loss upon the shipowner, at least originally, is a good means for promoting greater care in the industry⁴⁹ and that through the right of indemnity for breach of the implied warranty of workmanlike service the ultimate

39. See *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *The Arizona v. Anelich*, 298 U.S. 110 (1936); *Warner v. Goltra*, 293 U.S. 155 (1934).

40. See *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *The Arizona v. Anelich*, 298 U.S. 110 (1936); notes 31-35 *supra* and accompanying text.

41. See *Hudson Waterways Corp. v. Schneider*, 365 F.2d 1012 (9th Cir. 1966); *Krey v. United States*, 123 F.2d 1008 (2d Cir. 1941); *The H.A. Scandrett*, 87 F.2d 708 (2d Cir. 1937); notes 64-118 *infra* and accompanying text.

42. See, e.g., *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 103 (1944).

43. *Warner v. Goltra*, 293 U.S. 155 (1934) (construing Jones Act liberally).

44. See *United Pilots Ass'n v. Halecki*, 358 U.S. 613 (1959); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *Hudson Waterways Corp. v. Schneider*, 365 F.2d 1012 (9th Cir. 1966).

45. See *United Pilots Ass'n v. Halecki*, 358 U.S. 613 (1959); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939).

46. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Krey v. United States*, 123 F.2d 1008 (2d Cir. 1941); *The H.A. Scandrett*, 87 F.2d 708 (2d Cir. 1937).

47. See *The State of Maryland*, 85 F.2d 944 (4th Cir. 1936) (created absolute duty to warn of dangerous propensities of machinery, analogous to duty to furnish a seaworthy vessel, because of increased hazard to seamen caused by shipping industry's change from sail to steam). See also M. NORRIS, *MARITIME PERSONAL INJURIES* § 31, at 62-63 (2d ed. 1966).

48. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Ezekiel v. Volusia Steamship Co.*, 297 F.2d 215 (2d Cir. 1961) (dissenting opinion), *cert. denied*, 369 U.S. 843, *reh. denied*, 369 U.S. 891 (1962); *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir.), *cert. denied*, 343 U.S. 966 (1952); *The H.A. Scandrett*, 87 F.2d 708 (2d Cir. 1937).

49. See *Ezekiel v. Volusia Steamship Co.*, 297 F.2d 215 (2d Cir. 1961) (dissenting opinion), *cert. denied*, 369 U.S. 843, *reh. denied*, 369 U.S. 891 (1962).

loss (in the absence of insurance) is placed upon the party best able to minimize the risk involved.⁵⁰

As indicated above, the courts have generally followed the lead of the Supreme Court in its policy of liberal treatment for seamen. Some of the arguments offered in support of special treatment for seamen have also been used to justify similar treatment for longshoremen and other harbor workers under the unseaworthiness doctrine, on the grounds that they are employed to do work formerly done by seamen.⁵¹ Legal commentaries, however, have been very much in conflict over the issue of special treatment for seamen. In addition to the arguments raised by judges favoring special treatment, commentaries have offered additional arguments supporting this view.⁵² Thus it has been argued that special protection for seamen has a salutary effect on the shipping industry in that broad protection will attract men into the hazardous trade.⁵³ It is also argued that despite improvements in living and working conditions aboard ship, these improvements have not out-stripped similar improvements in shore-based industries, and that, basically, the inconveniences and dangers of going to sea have changed little.⁵⁴

Several arguments have been offered in opposition to the policy of special treatment for seamen and particularly in opposition to further liberalization of the law towards seamen and harbor workers "similarly" situated.⁵⁵ It is argued that a seaman's living and working conditions have improved to a point where there is no longer justification for better treatment than shore-based workers, if indeed there ever was.⁵⁶ It is also argued that the enterprise liability theory is not necessarily effective in spreading the loss of a hazardous industry among its users, since many insurers have withdrawn from coverage and rates are high. The cost of insurance or of judgments to the uninsured cannot necessarily be reflected in the price of services offered, especially since the American shipping industry must compete with those of other countries and with other means of transportation.⁵⁷ It is also noted that the shipping industry is in a depressed condition,⁵⁸ that it is important to the welfare of the nation, and that seamen

50. *See Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

51. *See notes 98-108 infra and accompanying text.*

52. *See generally* Norris, *The Seaman as Ward of the Admiralty*, 52 MICH. L. REV. 479 (1954); Standard, *Are the Admiralty's "Jolly Little Wards" Really So Privileged?*, 46 A.B.A.J. 1323 (1960); 66 COLUM. L. REV. 1180 (1966).

53. Norris, *The Seaman as Ward of the Admiralty*, 52 MICH. L. REV. 479 (1954).

54. *Id.*

55. *See generally* Foley, *A Survey of the Maritime Doctrine of Seaworthiness*, 46 ORE. L. REV. 369 (1967); Lovitt, *Things Are Seldom What They Seem: The Jolly Little Wards of the Admiralty*, 46 A.B.A.J. 171 (1960); Tetrault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381 (1954); Wood, *"Old Father Antic the Law": The Favorites of the Courts of Admiralty*, 41 A.B.A.J. 924 (1955); 15 S.W.L.J. 328 (1961).

56. Foley, *A Survey of the Maritime Doctrine of Seaworthiness*, 46 ORE. L. REV. 369 (1967); Norris, *The Seaman as Ward of the Admiralty*, 52 MICH. L. REV. 479 (1954).

57. *See* Foley, *A Survey of the Maritime Doctrine of Seaworthiness*, 46 ORE. L. REV. 369, 421 (1967); Tetrault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381, 416-18 (1954).

58. 66 COLUM. L. REV. 1180 (1966).

benefit from the industry as well as do its users.⁵⁹ It has been argued that the absolute liability imposed by the unseaworthiness doctrine is unjustified because seamen have the absolute right to maintenance and cure, and harbor workers the absolute right to compensation.⁶⁰ It has also been argued that the expansion of the doctrine of unseaworthiness in general is unjustified because the doctrine permits suits in rem, the law in general being opposed to the expansion of secret liens,⁶¹ and because it is engulfing the Jones Act,⁶² although it has been argued to the contrary that the substitution of one remedy for two is always beneficial.⁶³

Since the Supreme Court has consistently decided that seamen and harbor workers are to be liberally treated, it would seem that criticism would now be more constructively directed to improvement of the vehicle which is to achieve this result, consistent with fairness to prospective defendants. In this vein, it would seem that the law of unseaworthiness, specifically, could use streamlining. Before any conclusion can be drawn, however, it is first necessary to trace the development of the law of unseaworthiness by following the expansion of the factual scope of coverage and the class of persons covered.

THE EXPANSION OF THE SCOPE OF COVERAGE OF THE UNSEAWORTHINESS DOCTRINE

The right of a seaman to indemnity for personal injuries caused by unseaworthiness was first noted by the Supreme Court in a dictum by Mr. Justice Brown in *The Osceola*⁶⁴ in 1903: "The vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."⁶⁵ Since *The Osceola*, the factual scope of coverage of the doctrine of unseaworthiness has been tremendously expanded,⁶⁶ particularly in recent years, despite a fairly consistent

59. Foley, *A Survey of the Maritime Doctrine of Seaworthiness*, 46 ORE. L. REV. 369, 420 (1967).

60. *Id.*

61. 57 YALE L.J. 243, 256 (1947). See also *The State of Maryland*, 85 F.2d 944 (4th Cir. 1936) (dissenting opinion opposed to creation of new secret lien for duty, analogous to seaworthiness, to warn of dangerous propensities of machinery).

62. 66 COLUM. L. REV. 1180 (1966).

63. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6-38, at 316 (1957).

64. 189 U.S. 158 (1903). For discussions of the ancestry of the doctrine prior to the famous dictum in *The Osceola*, see *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *United Pilots Ass'n v. Halecki*, 358 U.S. 613 (1959) (dubious ancestry); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) (origins "perhaps unascertainable"); *The Arizona v. Anelich*, 298 U.S. 110, 121 n.2 (1936); *Tetrault, Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381 (1954); G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6-38, at 316 (1957).

65. *The Osceola*, 189 U.S. 158, 175 (1903). The case came to the Supreme Court on certification of questions, none of which involved seaworthiness, from the Court of Appeals for the Seventh Circuit, and the holding of the case was that a shipowner is not liable for the negligent acts of the ship's master or crew. For discussions of the ancestry of the doctrine prior to *The Osceola*, see authorities cited in note 64 *supra*.

66. For discussions of this development see generally *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *The Arizona v. Anelich*, 298 U.S. 110 (1936); *Waldron v. Moore-McCormack Lines, Inc.*, 356 F.2d 247 (2d Cir. 1966); G. GILMORE & C. BLACK, *THE LAW*

adherence to the original definition⁶⁷ of the term. This expansion has been led by the Supreme Court itself.⁶⁸ Perhaps because the case involved an attempt to recover for negligently caused injury, the Supreme Court's decision in *The Osceola* was originally interpreted as giving a remedy only for negligently caused unseaworthiness.⁶⁹ However, in the 1922 case of *Carlisle Packing Co. v. Sandanger*,⁷⁰

OF ADMIRALTY (1957); M. NORRIS, *MARITIME PERSONAL INJURIES* (2d ed. 1966); Tetrault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381 (1954).

67. The words used to define seaworthiness have not undergone much change in decisions by the Supreme Court. In *The Silvia*, 171 U.S. 462 (1898), a suit for damage to cargo, the test was stated to be whether the vessel was reasonably fit to carry the cargo undertaken to transport. In *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944), the test applied to a piece of equipment was its adequacy for the purpose for which it was ordinarily used. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955), defined seaworthiness as applied to personnel as whether or not the seaman in question was equal in disposition and seamanship to the ordinary men of the calling. In *McAllister v. Magnolia Petro. Co.*, 357 U.S. 221 (1958), the Court stated that the test was *not* whether a defect was of such quality as to render the *whole* vessel unfit for the purpose for which it was intended but that only the fitness of the particular part of the ship called into question need be observed. The dissent in *Crumady v. The J.H. Fisser*, 358 U.S. 423 (1959), defined unseaworthiness as applied to equipment as reasonable fitness for its intended use. The same definition was repeated in *Michalic v. Cleveland Tankers, Inc.*, 362 U.S. 539 (1960), in regard to the duty to furnish tools reasonably fit for their intended use. In *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960), the duty was said to be "... to furnish a vessel and appurtenances reasonably suitable for her intended service." The definition of reasonable fitness of a vessel for her intended service was repeated in *Morales v. City of Galveston*, 370 U.S. 165 (1962). In *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963), the term was defined as reasonable fitness for the purpose intended.

The circuit courts have sometimes used slightly different wording to define seaworthiness. The First Circuit has defined a seaworthy vessel as one sufficient or reasonably adequate for the trade or service in which it is employed, *Doucette v. Vincent*, 194 F.2d 834 (1st Cir. 1952), and seaworthy equipment as "reasonably fit and safe for its purpose, and reasonably adequate to the place and occasion where used by direction of the owners," *Nunes v. Farrell Lines*, 227 F.2d 619, 622 (1st Cir. 1955).

In addition to the usual wording, the Second Circuit has further defined a seaworthy vessel as one "as fit for service as similar vessels in similar service," *Poignant v. United States*, 225 F.2d 595 (2d Cir. 1955), and as one reasonably fit for the purpose for which it is being used, *Lester v. United States*, 234 F.2d 625 (2d Cir. 1956). It has also said that a vessel must be in all respects reasonably fit to permit libellant to perform his task aboard with reasonable safety, *id.* at 628, and that it must be reasonably fit for the particular voyage and reasonably fit and safe for the particular uses or purposes to which it is put. *Blier v. United States Lines Co.*, 286 F.2d 920 (2d Cir.), *cert. denied*, 368 U.S. 836 (1961).

The Fifth Circuit has further defined seaworthiness as the absolute duty to select and keep in order reasonably suitable appliances. *Cox v. Esso Shipping Co.*, 247 F.2d 629 (5th Cir. 1957). In *Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964), the court also phrased seaworthiness as "fit in the eyes of the law for the life and limb of those who go down to the sea in ships," *id.* at 190, and as "reasonable fitness to perform the work at hand," *id.* at 191. Slightly different wording was also used in *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193, 196 (5th Cir. 1967), quoting *Vickers v. Tumey*, 290 F.2d 426, 433 n.5 (5th Cir. 1961): "Seaworthiness . . . means that under the circumstances existing at the time of injury, the vessel and her equipment . . . were reasonably fit to perform the duty of safety, which this vessel owed to human beings aboard her, and to perform duties for which they were intended."

Other circuits have applied one or another of the definitions noted above. 68. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6-5, at 253 n.12 (1957): "Since the Supreme Court has claimed the field of maritime personal injury litigation as its own, lower court decisions have suffered from rapid technological obsolescence."

69. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

70. 259 U.S. 255 (1922). Prior to this decision Congress had "reversed" the holding of *The Osceola* by passing the Jones Act, 46 U.S.C. § 688 (1964); this act allows a seaman to recover indemnity for injuries caused by the negligence of a

the Supreme Court stated, in dictum, that the jury *need not have considered* negligence (though there was obvious negligence in the case) in deciding that the vessel was unseaworthy when it left port without life preservers and carrying a can containing gasoline which was marked and used as coal oil.

The next step in this expansion by the Supreme Court did not occur until 1944 when *Mahnich v. Southern S.S. Co.*⁷¹ was decided. In this case there had been a finding of negligence on the part of a mate in selecting a rotten rope and ordering it used to support a staging, but the statute of limitations for negligent liability under the Jones Act had run. Nevertheless, the Court held that the negligence had created an unseaworthy condition and that, as a result, the shipowner was liable. The seaworthiness of the ship when it left port and the availability of good rope aboard were held immaterial. The Court stated that a man must be provided with seaworthy and safe appliances "when and where . . . work is to be done."⁷² Again by way of dictum, the Court stated that the ship would have been unseaworthy even if the mate had not been negligent because:

The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged. Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable.⁷³

In 1946, the rule that a finding of negligence is unnecessary to a finding of unseaworthiness was ostensibly applied in *Seas Shipping Co. v. Sieracki*.⁷⁴ There the Supreme Court affirmed a finding of unseaworthiness based on a *latent* defect in the forging of a steel shackle.⁷⁵

The factual scope of liability was again broadened in 1954 in *Alaska Steamship Co. v. Petterson*,⁷⁶ a per curiam opinion by the Supreme Court which affirmed a finding of unseaworthiness by merely citing *Sieracki* and *Pope & Talbot v. Hawn*⁷⁷ without explanation. In *Petterson* the alleged unseaworthy condition was a defective snatch

fellow crewman. See *Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928) (discussing effect of Jones Act on existing law); notes 8-12 *supra* and accompanying text.

71. 321 U.S. 96 (1944).

72. *Id.* at 104.

73. *Id.* at 103.

74. 328 U.S. 85 (1946).

75. The finding was not disputed by the defendant who chose to contend that the libellant should not be covered because he was a longshoreman. See the discussion of the expansion of the class of people covered by the unseaworthiness doctrine, originating in this case, in notes 98-102 *infra* and accompanying text.

76. 347 U.S. 396 (1954).

77. 346 U.S. 406 (1953). As aptly pointed out by the *Petterson* dissent, neither the *Sieracki* nor the *Hawn* decisions, cited as authority, had touched the real issue of the *Petterson* case. *Sieracki* and *Hawn* had merely extended the coverage of the unseaworthiness warranty to longshoremen and repairmen, respectively, while *Sieracki* also upheld recovery for injury caused by a *latent* defect in equipment. The real issue in *Petterson* was not whether unseaworthiness liability should attach for injury to a man clearly a *Sieracki* "seaman" (longshoreman), but whether unseaworthiness liability should attach where injury was caused by a defect in equipment belonging to, brought aboard by, and used by the stevedoring company, an issue not present in either of the other cases.

block. Such an item is standard equipment aboard a ship, but this one was brought aboard by a stevedoring company and was used solely by its employees. Since *Petterson*, liability for defective equipment brought aboard and controlled by others has been extended by the lower federal courts to equipment *not customarily found aboard ship*.⁷⁸ The lower federal courts have also interpreted⁷⁹ *Petterson* and its companion per curiam opinion *Rogers v. United States Lines*⁸⁰ as overruling a line of lower court cases which had held that a shipowner was not liable for the unseaworthiness of a part of a vessel over which control had been relinquished to a contractor for repairs, unloading, or the like.⁸¹

The next expansion by the Supreme Court of the scope of coverage came in 1955 in *Boudoin v. Lykes Brothers Steamship Co.*⁸² In this case the Court affirmed a finding of liability for unseaworthiness for an injury caused by an assault by a fellow crew member. The Court refused to distinguish between defective equipment and defective personnel but stated that liability would not attach for every ship board assault but only for those in which the assailant was not equal in disposition and seamanship to the ordinary men in the calling.⁸³

In 1959, in *Crumady v. The Joachin Hendrik Fisser*,⁸⁴ the Court broadened the scope of the warranty, as it pertains to equipment, to include not only defective equipment, but also equipment which has been rendered unsafe by the act of a person; unseaworthiness was found in an incorrect setting on the electrical circuit-breaker of a winch. This case, however, has *not* been interpreted to hold that *any* improper use of non-defective equipment may give rise to unseaworthiness liability.

The scope of liability was again extended and clarified in 1960. In *Mitchell v. Trawler Racer, Inc.*,⁸⁵ the Court held that a *transitory* unsafe condition (here slime left on the rail of a fishing boat), arising after leaving port and not caused by negligence, could give rise to liability for unseaworthiness regardless of whether it had existed long enough before the injury to give the ship's crew a reasonable opportunity to discover and correct it. The Court stated that there had been a "complete divorcement of unseaworthiness liability from con-

78. *Arena v. Luckenbach S.S. Co.*, 279 F.2d 186, 188 n.3 (1st Cir.), *cert. denied*, 364 U.S. 895 (1960) (dictum — board used to load cargo could have rendered vessel unseaworthy if defective though not customarily ship's equipment); *Considine v. Black Diamond S.S. Corp.*, 163 F. Supp. 109 (D. Mass. 1958) (truck).

79. *See* *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359 (2d Cir. 1966); *Scott v. Isbrandtsen Co.*, 327 F.2d 113 (4th Cir. 1964); *Ballwanz v. Isthmian Lines, Inc.*, 319 F.2d 457 (4th Cir. 1963), *cert. denied*, 376 U.S. 970 (1964); *Massa v. C.A. Venezuelan Navigacion*, 298 F.2d 239 (2d Cir. 1962); *Berti v. Compagnie de Navigation Cyprien Fabre*, 213 F.2d 397 (2d Cir. 1954) (dictum).

80. 347 U.S. 984 (1954).

81. *See, e.g.*, *Rogers v. United States Lines*, 205 F.2d 57 (3d Cir. 1953), *rev'd*, 347 U.S. 984 (1954) (stevedores); *Byars v. Moore-McCormack Lines*, 155 F.2d 587 (2d Cir. 1946) (repairmen).

82. 348 U.S. 336 (1955).

83. The Court here followed the rule set forth by Judge L. Hand in *Jones v. Lykes Bros. S.S. Co.*, 204 F.2d 815 (2d Cir. 1953), and *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir.), *cert. denied*, 343 U.S. 966 (1952).

84. 358 U.S. 423 (1959).

85. 362 U.S. 539 (1960).

cepts of negligence."⁸⁶ The Court did *not* say, however, that the duration of an unsafe condition or the foreseeability of injury could not in some way influence unseaworthiness liability.

In 1962 in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*,⁸⁷ the Supreme Court extended the warranty to include defective *cargo containers* — specifically, bands placed around bales. In the same year the Court also decided *Morales v. City of Galveston*,⁸⁸ a case which both limited and extended liability for unseaworthiness. In *Morales* the last "shot" of grain loaded into a hold was contaminated with noxious fumes which caused injury. Though the ship was not equipped with blowers for ventilation, the majority affirmed a finding of seaworthiness, stating that "what caused injury in the present case was not the ship, its appurtenances, or its crew, but the isolated and completely *unforeseeable* introduction of a noxious agent from *without*."⁸⁹ The decision went on by way of dictum, however, to expand the scope of liability to the method of loading cargo and the manner of its stowage.⁹⁰

In 1963, the Supreme Court took still another step in the expansion of the doctrine of unseaworthiness. In *Gutierrez v. Waterman Steamship Corp.*⁹¹ the Court held that a shipowner could be liable for unseaworthiness when a longshoreman *on the dock* onto which the ship was unloading beans was injured when he slipped on beans spilled from a leaky bag unloaded from the ship. The Court stated that the Extension of Admiralty Jurisdiction Act⁹² had extended admiralty jurisdiction to maritime torts causing injury *ashore* and that under that jurisdiction the seaworthiness warranty would be extended to defective cargo containers and improper stowage causing injury ashore. The Court explained that "[s]eaworthiness is not limited, of course, to fitness for travel on the high seas; it includes fitness for loading and unloading."⁹³ Though there is substantial disagreement, some lower federal courts have expanded the scope of liability beyond the *Gutierrez* holding to include injury ashore from *shore-based* equipment not attached to or touching the vessel but in some way used to perform the ship's work.⁹⁴ The dissent in *Gutierrez*

86. *Id.* at 550.

87. 369 U.S. 355 (1962).

88. 370 U.S. 165 (1962).

89. *Id.* at 171 (emphasis added).

90. *Id.* at 170. The Court here was presumably speaking only of the method or manner of loading and stowage in the sense of the condition in which cargo is left aboard by those who have loaded it, and not of the active procedures that are used in the process of loading and stowing. See the discussion of the act-condition distinction in notes 165-71 *infra* and accompanying text.

91. 373 U.S. 206 (1963).

92. 46 U.S.C. § 740 (1964).

93. 373 U.S. at 213.

94. *Dugas v. Nippon Yusen Kaisha*, 378 F.2d 271 (5th Cir. 1967) (dictum); *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422 (5th Cir. 1966); *Spann v. Lauritzen*, 344 F.2d 204 (3d Cir.), *cert. denied*, 382 U.S. 938 (1965), *reh. denied*, 382 U.S. 1000 (1966); *Huff v. Matson Navigation Co.*, 338 F.2d 205 (9th Cir.), *cert. denied*, 380 U.S. 943 (1964); see Note, *Unseaworthy Shore-Based Equipment*, 18 *HASTINGS L.J.* 1021 (1967) (supporting extension). *Contra*, *Forkin v. Furness Withy & Co.*, 323 F.2d 638 (2d Cir. 1963); *McKnight v. N.M. Paterson & Sons*, 286 F.2d 250 (6th Cir. 1960), *cert. denied*, 368 U.S. 913 (1961); *Fredericks v. American Export Lines*, 227

objected to what it felt to be an extension of liability for unseaworthiness, beyond the manner of stowage of cargo, to the condition of the cargo itself.⁹⁵ Though the holding of the *Gutierrez* case is not clear on this point, at least one lower federal court has stated that a dangerous condition of cargo itself can render a ship unseaworthy.⁹⁶ The *Morales* decision has been interpreted as forbidding such an extension,⁹⁷ but, as will be discussed later, that decision should probably be interpreted as forbidding an extension of liability to dangerous cargo only when the dangerous nature of the cargo is unforeseeable and when the cargo is in the process of being loaded aboard.

EXPANSION OF COVERAGE: CLASS OF PERSONS

Until 1946, the warranty of seaworthiness was available only to seamen. In that year, however, in *Seas Shipping Co. v. Sieracki*,⁹⁸ the Supreme Court affirmed an award of recovery to a longshoreman,⁹⁹ holding that the duty to provide a seaworthy ship extends to all who do loading and unloading and other ship's work which was traditionally done by seamen.¹⁰⁰ The *Sieracki* Court reasoned that a ship-

F.2d 450 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *Henry v. S.S. Mount Evans*, 227 F. Supp. 408 (D. Md. 1964).

95. 373 U.S. at 217.

96. *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367, 371 (9th Cir. 1964). *Contra*, *Carabellese v. Naviera Aznor, S.A.*, 285 F.2d 355 (2d Cir. 1960) (not liable for defect in cargo alone, without other factors, at least while still being loaded — decided before *Morales* and *Gutierrez*); *McMahan v. The Panamolga*, 127 F. Supp. 659 (D. Md. 1955) (same).

97. *See* 37 TUL. L. REV. 106 (1962) (noting *Morales*). *But see* text at and following note 173 *infra*.

98. 328 U.S. 85 (1946).

99. For general discussions of the extension of the warranty to harbor workers see M. NORRIS, MARITIME PERSONAL INJURIES §§ 14-15, at 25-31 (2d ed. 1966); Shields & Byrne, *Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. PA. L. REV. 1137 (1963); Tetrault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381 (1954); 29 U. CHI. L. REV. 519 (1962). In *Calderola v. Cunard S.S. Co.*, 279 F.2d 475 (2d Cir. 1960), the court stated that the unseaworthiness warranty to longshoremen would extend only to the limits of the place of work or to where it is reasonable to expect a longshoreman to go aboard ship. In *Schell v. Chesapeake & O. Ry.*, 264 F. Supp. 484 (E.D. Va. 1967), *rev'd on other grounds*, 395 F.2d 676 (4th Cir. 1968), the court made mention of the fact that the plaintiff machinist's helper of the marine mechanical department of defendant railway was within the working area of his assigned task when injured, though liability was denied on other grounds.

100. This statement about the history of longshoring was repeated again in *Crumady v. The J.H. Fisser*, 358 U.S. 423 (1959), but its accuracy has been questioned. Those commentators questioning the historical accuracy of the statement claim that it would be more accurate to state "that on some vessels in some trades some mariners sometimes have done some of the loading and unloading of the vessels." M. NORRIS, MARITIME PERSONAL INJURIES § 14, at 26 (2d ed. 1966), quoting Tetrault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381, 414 (1954). *See also* Shields & Byrne, *Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. PA. L. REV. 1137, 1139-47 (1963). One commentator has argued that regardless of history, harbor workers have as great or greater need of seaworthy equipment as do seamen, since they must perform very dangerous work on unfamiliar ships, and that the best way to enforce regulations concerning equipment is to create liability for injury caused by substandard equipment. R. Klonsky, *New Longshoremen — His Status In Jeopardy*, TENTH ANNUAL PROCEEDINGS, NATIONAL ASSOCIATION OF CLAIMANTS COMPENSATION ATTORNEYS (1956), quoted in M. NORRIS, MARITIME PERSONAL INJURIES § 14, at 26-27 (2d ed. 1966). If longshoremen were denied unseaworthiness coverage there would be little incentive for shipowners to keep equipment that is predominantly used by longshoremen rather

owner should not be allowed to escape liability by contracting away dangerous work to an independent contractor. The liability for unseaworthiness, based not on contract or negligence but on the relationship of the worker to the hazards of marine service, was to be extended to anyone "doing a seaman's work and incurring a seaman's hazards."¹⁰¹ A strong dissent in *Sieracki* questioned the validity of extending coverage to persons who do not really incur a seaman's hazards, who do not go to sea, who are not subject to the same rigid discipline and who can leave a vessel when they desire.¹⁰²

The class of persons covered by what has become known as the "warranty" of seaworthiness, despite its non-contractual basis, was extended in 1953, in *Pope & Talbot v. Hawk*,¹⁰³ to a repairman¹⁰⁴ who had been called aboard ship to repair grain-loading equipment and was injured there in a slip and fall. Again a strong dissent questioned the extension of the warranty to one "who lived at home, was free to leave his employment, took no risks of the sea and had no different condition or hazard attached to his employment than would have attached to a carpentry job in a building ashore."¹⁰⁵

In 1959, the Supreme Court seemingly placed a limitation on the class of people to be protected by the warranty. In *United Pilots Ass'n v. Halecki*,¹⁰⁶ the estate of a repairman was denied recovery for death caused by inhaling carbon tetrachloride fumes while spraying the inside of a dismantled generator during an annual overhaul. Recovery was denied on the ground that the injured repairman was a specialized worker using specialized equipment in performing work not traditionally done by seamen. The effect to be given this decision, however, is unclear. *Sieracki* held that a modern division of labor was not to relieve a shipowner of liability for work traditionally done by seamen, and *Hawk* included repairing as work traditionally done by seamen. It is difficult to see any meaningful distinction between the repair work done in *Hawk* and the repair work done in *Halecki*, except that the former was performed in the course of loading while the latter was a bit more specialized, involving more specialized equipment. It is also difficult to see a meaningful distinction between the

than seamen up to standard. It has also been argued that the longshoreman has a peculiar need for the absolute liability and in rem provisions of unseaworthiness coverage, since he is likely to be injured on transient ships of a foreign register, against which it would be very difficult and expensive to prove a case of common law negligence. Letter from Bernard Chosen to House Committee on Education and Labor, Report by Special Subcommittee, December 1956, quoted in M. NORRIS, MARITIME PERSONAL INJURIES § 14, at 27-29 (2d ed. 1966).

Though the *Sieracki* case is binding precedent upon lower courts, doubt as to the historical accuracy of its rationale has led at least Judge Friendly of the Second Circuit to seek to restrict its application. See *Forkin v. Furness Withy & Co.*, 323 F.2d 638 (2d Cir. 1963); *Shenker v. United States*, 322 F.2d 622 (2d Cir. 1963) (dissenting opinion), *cert. denied*, 376 U.S. 907 (1964).

101. 328 U.S. at 99.

102. For a discussion of the justification for awarding seamen special treatment under the seaworthiness doctrine see notes 39-63 *supra* and accompanying text.

103. 346 U.S. 406 (1953).

104. Cf. *The Tungus v. Skovgaard*, 358 U.S. 588 (1959) (recovery by stevedore maintenance foreman).

105. 346 U.S. at 424.

106. 358 U.S. 613 (1959).

cleaning in *Halecki* and the cleaning traditionally and presently done by seamen.

The *Halecki* decision has not, in fact, provided the lower federal courts with a workable guide to the limits of the class of persons covered by the unseaworthiness warranty.¹⁰⁷ This is not surprising in view of the varied nature of work done by seamen down through the centuries under sail and steam:

If the test is to be whether the injured person was performing the customary work of the crew at the time of injury, it should be evident that aside from ship repairs of a major type such as collision damage repairs and reconversions, virtually all maintenance and repair work now performed by shoreside specialists under contract should come under the seaworthiness doctrine for they are duties once carried out by the ship's crew.¹⁰⁸

Other limitations were placed upon the coverage of the unseaworthiness doctrine in 1959. In *Kermarec v. Compagnie Generale Transatlantique*,¹⁰⁹ the protection of the warranty was denied to a crew-member's social guest who was rightfully aboard the ship,¹¹⁰ and, in *West v. United States*,¹¹¹ the protection of the warranty was denied to a repairman injured while repairing a ship undergoing a complete overhaul to make her seaworthy. In *West*, the Court stated that the seaworthiness of a ship is not warranted when the ship is "out of navigation," undergoing extensive repairs, and when control of the entire ship has been surrendered by the shipowner. The Court further concluded that the question of whether the work being done by the injured man was traditionally that of a seaman should not be reached until the status of the ship, whether it is in or out of navigation, had first been decided. The question of when a ship is to be considered "out of navigation" was somewhat clarified by the Court in 1961 in *Roper v. United States*,¹¹² where a ship being used as a floating warehouse was held to be out of navigation. The concept of "out of navigation," then, apparently includes vessels deactivated for extensive repairs and those converted to non-maritime uses. The concept has not been further clarified by the Supreme Court but has been applied and somewhat clarified by the lower courts.¹¹³

107. See, e.g., *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422 (5th Cir. 1966) (use of specialized equipment does not preclude liability); *Huff v. Matson Navigation Co.*, 338 F.2d 205 (9th Cir.), cert. denied, 380 U.S. 943 (1964) (same). *Contra*, *Partridge v. Pope & Talbot, Inc.*, 257 F. Supp. 456 (N.D. Cal. 1965) (warranty not applied to land-based surveyor utilizing specialized professional skills aboard).

108. M. NORRIS, MARITIME PERSONAL INJURIES § 51, at 113 (2d ed. 1966).

109. 358 U.S. 625 (1959).

110. The Court also stated that in admiralty there would be no distinction made, as at common law, between business invitee and licensee and that a shipowner must exercise reasonable care toward anyone rightfully aboard his ship. His duty, if any, to trespassers was not mentioned. 358 U.S. at 630-32.

111. 361 U.S. 118 (1959).

112. 368 U.S. 20 (1961).

113. See *Latus v. United States*, 277 F.2d 264 (2d Cir. 1960) (warranty does not attach to parts of a vessel as they return to service); *Lawlor v. Socony-Vacuum Oil Co.*, 275 F.2d 599 (2d Cir.), cert. denied, 363 U.S. 844 (1960); *Schell v. Chesapeake & O. Ry.*, 264 F. Supp. 484 (E.D. Va. 1967); *Lupo v. Consolidated Mariners, Inc.*, 261 F. Supp. 450 (S.D.N.Y. 1966); *Landry v. M.&W. Marine Ways, Inc.*, 257 F. Supp. 45 (E.D. La. 1966).

Finally, in *Gutierrez v. Waterman Steamship Corp.*,¹¹⁴ a long-shoreman injured *ashore* while unloading was allowed to recover for unseaworthiness. The question of when *loading* and *unloading* begin and end ashore was not discussed by the Court and has been the subject of litigation in the lower courts.¹¹⁵

The class of persons covered by the doctrine of unseaworthiness has been extended somewhat beyond Supreme Court decisions by lower courts. For example, the warranty has been applied to a man working aboard a fishing vessel as a joint-venturer sharing in the catch,¹¹⁶ to a volunteer crew member working without pay on a pleasure yacht,¹¹⁷ and to a seaman who procured his job through fraud.¹¹⁸

Thus, the development of the law of unseaworthiness has been characterized almost uniformly by an expansion of coverage. Our purpose is now to examine in more detail the present state of the law of unseaworthiness, focusing particularly upon one limitation that has been placed on the doctrine by a majority of the lower federal courts.

LIMITATIONS ON THE DOCTRINE

The expansion of the unseaworthiness doctrine examined in the last section illustrates the myriad of situations in which unseaworthiness *may* be found. In *Mitchell v. Trawler Racer, Inc.*,¹¹⁹ however, the Supreme Court stated that a shipowner is not obligated to furnish an accident-free ship but rather has the absolute duty only to furnish a vessel and its appurtenances reasonably fit for their intended use.¹²⁰ Thus, the expansion of the doctrine of unseaworthiness has stopped short of making shipowners insurers of *every* injury aboard ship, except to the extent of a seaman's maintenance and cure, and judgments for defendants in seaworthiness cases are in fact still not uncommon. Let us now turn to an examination of limitations placed on the shipowner's unseaworthiness liability.

Before liability for unseaworthiness will attach, it must be demonstrated that an unseaworthy *condition* existed and that it was the *cause*, though not necessarily the only cause, of injury.¹²¹ Thus, liability is denied if the injury is caused by an *unsafe condition* that is not proved to have been *unseaworthy*, or if the injury is caused, not by an unseaworthy *condition*, but by something that is not considered a condition at all, such as an act or an unforeseeable outside agent.

114. 373 U.S. 206 (1963).

115. See *Daniel v. Skibs A/S Hilda Knudsen*, 368 F.2d 178 (3d Cir. 1966); *Spann v. Lauritzen*, 344 F.2d 204 (3d Cir.), *cert. denied*, 382 U.S. 938 (1965), *reh. denied*, 382 U.S. 1000 (1966); *Hagans v. Ellerman & Bucknall S.S. Co.*, 318 F.2d 563 (3d Cir. 1963); *Kent v. Shell Oil Co.*, 286 F.2d 746 (5th Cir. 1961); *Drumbold v. Plovba*, 260 F. Supp. 983 (E.D. Va. 1966); *Litwinowicz v. Weyerhaeuser S.S. Co.*, 179 F. Supp. 813 (S.D.N.Y. 1959).

116. *Clevenger v. Star Fish & Oyster Co.*, 325 F.2d 397 (5th Cir. 1963).

117. *In re Read's Petition*, 224 F. Supp. 241 (S.D. Fla. 1963).

118. *Spinks v. United States Lines Co.*, 223 F. Supp. 371 (S.D.N.Y. 1963).

119. 362 U.S. 539 (1960).

120. *Id.* at 550.

121. *Alaska S.S. Co. v. Garcia*, 378 F.2d 153 (9th Cir. 1967); *Arena v. Luckenbach S.S. Co.*, 279 F.2d 186 (1st Cir.), *cert. denied*, 364 U.S. 895 (1960); *Grillea v. United States*, 229 F.2d 687 (2d Cir. 1956).

The burden of proof of the existence of an unseaworthy condition¹²² and of its causal connection with injury¹²³ is upon the plaintiff. Sometimes, however, this burden is lightened. For example, to establish unseaworthiness a plaintiff must, in many cases, prove the unfitness of a ship's equipment. In such a case, if he can prove that his injury was caused by a failure due to a *defect*,¹²⁴ even if the defect was latent,¹²⁵ he has proved his case. If, however, he cannot prove the existence of a defect he may be allowed to invoke what has been called a "sea-going *res ipsa loquitur*."¹²⁶ Under this principle, an injured plaintiff need only prove that his injury was caused by a failure of equipment and that the equipment was being used in a normal and customary manner.¹²⁷ The burden then shifts to the defendant to prove some exculpatory cause of failure, such as negligent operation

122. *Titus v. The Santorini*, 258 F.2d 352 (9th Cir. 1958); *Reynolds v. Royal Mail Lines*, 254 F.2d 55 (9th Cir.), *cert. denied*, 358 U.S. 818 (1958); *Freitas v. Pacific-Atlantic S.S. Co.*, 218 F.2d 562 (9th Cir. 1955). It is possible that the burden of proof has been or will be shifted to the defendant by a presumption of unseaworthiness. See *Jackson v. S.S. King's Point*, 276 F. Supp. 451 (E.D. La. 1967). See also *Venable v. A/S Det Forenede Dampskibsselskab*, No. 11,799 (4th Cir., June 12, 1968); *Sanderlin v. Martin*, 373 F.2d 447 (4th Cir. 1967).

123. *Arena v. Luckenbach S.S. Co.*, 279 F.2d 186 (1st Cir.), *cert. denied*, 364 U.S. 895 (1960); *Titus v. The Santorini*, 258 F.2d 352 (9th Cir. 1958); *Grillea v. United States*, 229 F.2d 687 (2d Cir. 1956).

124. *Hudson Waterways Corp. v. Schneider*, 365 F.2d 1012 (9th Cir. 1966) (loose wiring in switch box); *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609 (5th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967) ("cotton key" fell out causing winch handle to jerk); *Vega v. The Malula*, 291 F.2d 415 (5th Cir. 1961) (pin fell out of block); *Reddick v. McAllister Lighterage Line*, 258 F.2d 297 (2d Cir.), *cert. denied*, 358 U.S. 908 (1958) (latent defect in board of cargo crate).

125. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359 (2d Cir. 1966); *Reddick v. McAllister Lighterage Line*, 258 F.2d 297 (2d Cir.), *cert. denied*, 358 U.S. 908 (1958). In *Bruszewski v. Isthmian S.S. Co.*, 163 F.2d 720 (3d Cir. 1947), *cert. denied*, 333 U.S. 828 (1948), the court denied recovery because a defect was *obvious*. This case is perhaps questionable in view of the rule established by the Supreme Court that assumption of risk is no defense to unseaworthiness liability, see note 32 *supra* and accompanying text, but may be an example of what is meant by the rule that a seaman assumes the risk of his calling, see note 31 *supra*. It follows a line of cases holding that the warranty of unseaworthiness does not apply to injuries from dangerous conditions which a seaman has been sent to correct. See notes 140-43 *infra* and accompanying text.

126. *Walker v. Harris*, 335 F.2d 185, 193 (5th Cir.), *cert. denied*, 379 U.S. 930 (1964).

127. *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193 (5th Cir. 1967) (liability for unexplained slip of steel beam from non-defective and customarily used sling); *Walker v. Harris*, 335 F.2d 185 (5th Cir.), *cert. denied*, 379 U.S. 930 (1964) (liability for injuries from exposure in lifeboat due to sinking of tug in foreseeable storm); *Texas Menhaden Co. v. Johnson*, 332 F.2d 527 (5th Cir. 1964) (liability for injuries from buckling of crane when no evidence that alleged snag of line on bottom was unforeseeable); *Van Carpals v. The S.S. American Harvester*, 297 F.2d 9 (2d Cir. 1961), *cert. denied*, 369 U.S. 865 (1962) (liability for unexplained escape of steam while valve being dismantled); *Sprague v. Texas Co.*, 250 F.2d 123 (2d Cir. 1957) (liability for unexplained escape of steam while head of heater being dismantled); *Manhat v. United States*, 220 F.2d 143 (2d Cir.), *cert. denied*, 349 U.S. 966 (1955) (*res ipsa* only applies when accident unexplained; here evidence showed cause was negligent operation). Apparently the burden is upon the plaintiff to prove that the equipment was being used in a normal, expected way. See *Titus v. The Santorini*, 258 F.2d 352 (9th Cir. 1958) (no liability for injury caused by break of wire and rope proved not defective for use where trier of fact apparently was undecided whether negligent use at moment of injury caused break or earlier use rendered it unsuitably weak and unseaworthy); *Manhat v. United States*, 220 F.2d 143 (2d Cir.), *cert. denied*, 349 U.S. 966 (1955) (no liability for injury caused by fall of lifeboat from davits where no direct evidence of customary use or negligence where equipment not defective and only reasonably possible inference was that the lever had been negligently moved).

of the equipment¹²⁸ or the intervention of an outside force.¹²⁹ If, to escape liability, the defendant relies on an intervening outside force, it must also appear that the force causing the failure was unforeseeable.¹³⁰

It has often been said that the standard of seaworthiness is not perfection but only reasonable fitness.¹³¹ There seems to be agreement that the reasonable fitness standard requires that a vessel at least meet the customary standards of the industry, but the cases are not all clear as to whether a ship is necessarily seaworthy if it has met customary standards when those standards are not felt to be sufficiently high.¹³² Whatever the standard, certain types of conditions

128. *Spinelli v. Isthmian S.S. Co.*, 326 F.2d 870 (2d Cir.), *cert. denied*, 377 U.S. 935 (1964) (no liability for injury caused by slip in winch's brake where winch not defective and slip caused by improper operation); *Puddu v. Royal Netherlands S.S. Co.*, 303 F.2d 752 (2d Cir.), *cert. denied*, 371 U.S. 840 (1962) (no liability for injury caused by buckling of boom where buckling caused by negligent operation); *Titus v. The Santorini*, 258 F.2d 352 (9th Cir. 1958) (no liability for injury caused by break of wire and rope proved not defective before use where trier of fact apparently was undecided whether negligent use at moment of injury caused break or earlier use rendered it unsuitably weak and unseaworthy); *Manhat v. United States*, 220 F.2d 143 (2d Cir.), *cert. denied*, 349 U.S. 966 (1955) (no liability for injury caused by fall of lifeboat from its davits where caused by negligence).

129. *Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964), *cert. denied*, 379 U.S. 930 (1964) (dictum — but liability found because storm causing sinking was foreseeable); *Texas Menhaden Co. v. Johnson*, 332 F.2d 527 (5th Cir. 1964) (dictum — but liability found because alleged outside force, snag on sea bottom, was foreseeable).

130. See note 176 *infra* and accompanying text. Apparently the burden is upon the defendant to prove that the force was not foreseeable. See *Texas Menhaden Co. v. Johnson*, 332 F.2d 527 (5th Cir. 1964) (liability where no evidence that force was unforeseeable).

131. *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193, 201 (5th Cir. 1967); *Manhat v. United States*, 220 F.2d 143, 148 (2d Cir.), *cert. denied*, 349 U.S. 966 (1955); *Berti v. Compagnie de Navigation Cyprien Fabre*, 213 F.2d 397, 400 (2d Cir. 1954); *Doucette v. Vincent*, 194 F.2d 834, 837-38 (1st Cir. 1952); *Ivusich v. Cunard White Star, Ltd.*, 65 F. Supp. 412, 414 (S.D.N.Y. 1945). It has also been said that evidence of the best or better equipment available is inadmissible "for the purpose of fixing the defendants' substantive standard of conduct" but that such evidence is admissible, in the discretion of the trial court, on the issue of the reasonable fitness of the equipment used. *Doucette v. Vincent*, 194 F.2d 834, 838 (1st Cir. 1952).

It has also been held that evidence of the undertaking of improvements may not be taken as an implied admission of unseaworthiness. *Lester v. United States*, 234 F.2d 625, 628 (2d Cir. 1956). Presumably the reason for this rule is that the law does not wish to inhibit the undertaking of improvements by an evidentiary rule.

132. Most courts have adopted into the law of unseaworthiness the rule of *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932) (L. Hand, J.), a negligence case, that the standard of reasonableness is not necessarily controlled by the customary standard of the calling, since that standard may not be a reasonably safe one. *E.g.*, *Venable v. A/S Det Forenede Dampskibsselskab, No. 11,799* (4th Cir., June 12, 1968); *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193, 200 (5th Cir. 1967); *June T., Inc. v. King*, 290 F.2d 404, 406 (5th Cir. 1961); *Beard v. Ellerman Lines, Ltd.*, 289 F.2d 201 (3d Cir. 1961), *rev'd in part on other grounds sub nom.*, *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *Hanson v. Reiss S.S. Co.*, 184 F. Supp. 545 (D. Del. 1960); *Casbon v. Stockyard S.S. Corp.*, 173 F. Supp. 845 (E.D. La. 1959); *Foley, A Survey of the Maritime Doctrine of Seaworthiness*, 46 ORÉ. L. REV. 369, 416 (1967); 21 LA. L. REV. 755, 765 (1961). The Second Circuit, however, though not explicitly stating that a trier of fact may never find unseaworthiness despite compliance with the customary standards of the trade, seems definitely to lean toward such a rule. In *Poignant v. United States*, 225 F.2d 595 (2d Cir. 1955), the court stated that in view of the Supreme Court's *Boudoin* decision (no liability for unseaworthiness if assailant equal in disposition and seamanship to ordinary man in the calling), "so [too, a vessel] does not become unseaworthy by reason of a temporary condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service." *Id.* at 598. In *Nuzzo v. Rederi, A/S Wallenco*, 304 F.2d 506 (2d Cir. 1962), the court distinguished the *T.J. Hooper* on its facts and stated that it was not sure whether that case had survived the Supreme

aboard ship have been frequently found to be seaworthy even though they were unsafe.

In the *Mitchell* case, the Supreme Court stated that even if the *unseaworthy* condition were unavoidable by the exercise of due care, a shipowner would not be relieved of liability for injuries caused by that condition.¹³³ The Court did *not* say, however, that the trier of fact could not decide, in answer to the threshold question of seaworthiness, that the condition was reasonably fit, and thus not *unseaworthy*, because it was unavoidable. Thus unsafe conditions have been found to be seaworthy where they were found to be unavoidable.¹³⁴ Similarly, recovery has often been denied where injury was found to have been caused by a risk inherent and usual in the operation undertaken.¹³⁵

Court decisions in *Boudoin* and *Mitchell* which had divorced concepts of negligence from unseaworthiness liability. On the other hand, the court did state:

There are doubtless many cases in which the condition causing the injury was so unusual or, because of some hidden or unapparent defect, so clearly dangerous as to warrant the conclusion of unseaworthiness by the trier of fact, even in the absence of direct evidence that it was not "within the usual and customary standards" of comparable maritime activity.

Id. at 510 (quoting *Boudoin*).

Actually, the Supreme Court has not expressly stated the relation between seaworthiness and the customary standard of the trade except where the fitness of a *person* has been called into question. In *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955), a case of assault by a fellow crew member, the Court stated, "Was the assault within the usual and customary standards of the calling? . . . If it is . . . , it is one of the risks of the sea that every crew takes." *Id.* at 340. The Court went on to hold that, "the District Court was justified in concluding that [the assailant] was not equal in disposition to the ordinary men of that calling and that the crew with [him] as a member was not competent to meet the contingencies of the voyage." *Id.* The Court also stated that it saw "no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other." *Id.* at 339. But the *standard of the trade* was apparently not questioned in the case, since the assailant had not even met that standard. We do not, therefore, really know the position of the Supreme Court on the issue of whether or not the customary standard always controls. In *Salem v. United States Lines Co.*, 370 U.S. 31 (1962), the Court did hold that a ship could be found *unseaworthy* without the introduction of expert testimony of customary marine architecture and that such evidence, if introduced, would not necessarily control, but the decision may be taken as meaning only that expertise is not necessary and that the issue of customary equipment can be decided by an unassisted lay jury.

It is clear, however, from all of the above cases, that evidence of customary standards is admissible on the issue of reasonable fitness, and it appears that the customary standard is at least the minimum standard of fitness if it is found to be settled, definite, uniform, and widely followed. Foley, *A Survey of the Maritime Doctrine of Seaworthiness*, 46 ORE. L. REV. 369, 416 (1967). It seems apparent, also, that if a customary standard is reasonable, it will absolve a shipowner from unseaworthiness liability if it is followed, just as it will condemn him if it is breached. *Id.*

Evidence of violations of Coast Guard regulations, Foley, *A Survey of the Maritime Doctrine of Seaworthiness*, 46 ORE. L. REV. 369, 417-18 (1967), and of the Secretary of Labor's safety and health regulations for longshoring, 29 C.F.R. § 1504 (1968), promulgated under the authority of 33 U.S.C. § 941 (1964), *Provenza v. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963), is also relevant to the issue of the standard of unseaworthiness.

133. See notes 85-86 *supra* and accompanying text.

134. *Ezekiel v. Volusia S.S. Co.*, 297 F.2d 215 (2d Cir. 1961), *cert. denied*, 369 U.S. 843, *reh. denied*, 369 U.S. 891 (1962) (not *unseaworthy* merely because rust accumulated and had to be removed); *Holley v. The Manfred Stansfield*, 186 F. Supp. 212 (E.D. Va. 1960) (dictum: not *unseaworthy* where potash cargo unavoidably solidified due to hygroscopic nature — held: *unseaworthy* on other grounds); *Garrison v. United States*, 121 F. Supp. 617 (N.D. Cal. 1954) (not *unseaworthy* from wet deck where deck being washed by sea). But see *Schell v. Chesapeake & O. Ry.*, 395 F.2d 676 (4th Cir. 1968), *rev'g* 264 F. Supp. 484 (E.D. Va. 1967).

135. *Nuzzo v. Rederi, A/S Wallenco*, 304 F.2d 506 (2d Cir. 1962) (no liability for injury caused by slip into hole between pieces of lumber being unloaded, where

Thus a ship is not rendered unseaworthy because its deck is necessarily slippery while being washed by seamen¹³⁶ or by waves.¹³⁷ While it might be argued that a slippery deck is an obviously unsafe condition, recovery is denied on the grounds that a ship need be only *reasonably* fit and that the existence of certain reasonably unavoidable risks does not render a ship unseaworthy. Such risks are presumably included within the rule that a seaman assumes the risks of his calling but not of unseaworthy conditions.¹³⁸ Such reasoning is not always accepted, however, as was demonstrated by a case in the Fifth Circuit¹³⁹ in which a steel beam slipped from its sling and caused injury. The sling was of a type customarily used in the trade which was being used in the customary manner and which did not "break." The ship-owner was held liable on the grounds that the sling failed to perform its intended function and was therefore unseaworthy. A dissenting judge argued, to no avail, that an occasional slip was customary and inherent in the operation and was therefore to be expected. As a result, he contended, the sling and vessel were reasonably fit.

A factual situation analogous to that of a danger inherent in an operation, or unavoidable generally, is that of an injury caused by a condition which the injured plaintiff was sent to repair or correct. A rule has been established¹⁴⁰ which denies liability in such a case; this rule is presumably still accepted in at least the Third Circuit.¹⁴¹ The definite trend, however, has been either to reject the rule outright¹⁴² or to restrict it to cases of injury resulting from the *same part* or *defect* of an appliance that the plaintiff was assigned to repair.¹⁴³

gaps and holes inevitable); *Lind v. American Trading & Prod. Corp.*, 294 F.2d 342 (9th Cir. 1961) (not unseaworthy when deck necessarily slippery while being washed); *Hooper v. Terminal S.S. Co.*, 296 F.2d 281 (2d Cir. 1961) (not unseaworthy when cargo shifted where shifting was inherent condition of unloading deck cargo); *Garrison v. United States*, 121 F. Supp. 617 (N.D. Cal. 1954) (not unseaworthy from wet deck where deck being washed by sea); *Ivusich v. Cunard White Star, Ltd.*, 65 F. Supp. 412 (S.D.N.Y. 1945) (not unseaworthy where new winch operated stiffly as new winches usually do); *cf. Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193 (5th Cir. 1967) (dissenting opinion argued against unseaworthiness where risk of steel beam slipping from sling was inherent in operation). *But see Schell v. Chesapeake & O. Ry.*, 395 F.2d 676 (4th Cir. 1968), *rev'g*, 264 F. Supp. 484 (E.D. Va. 1967).

136. *Lind v. American Trading & Prod. Corp.*, 294 F.2d 342 (9th Cir. 1961).

137. *Garrison v. United States*, 121 F. Supp. 617 (N.D. Cal. 1954).

138. See notes 31-32 *supra* and accompanying text.

139. *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193 (5th Cir. 1967).

140. *Byars v. Moore-McCormack Lines*, 155 F.2d 587 (2d Cir. 1946), apparently overruled without mention in *Van Carpals v. The S.S. American Harvester*, 297 F.2d 9 (2d Cir. 1961), *cert. denied*, 369 U.S. 865 (1962) (recovery for injury from steam escaping from valve being repaired), and *Sprague v. Texas Co.*, 250 F.2d 123 (2d Cir. 1957) (recovery for injury from steam escaping from heater head being repaired).

141. *Mesle v. Kea S.S. Corp.*, 260 F.2d 747 (3d Cir. 1958), *cert. denied*, 359 U.S. 966 (1959) (dictum); *Bruszewski v. Isthmian S.S. Co.*, 163 F.2d 720 (3d Cir. 1947), *cert. denied*, 333 U.S. 828 (1948) (no recovery for injury caused by falling pulley while clearing deck of broken boom). See also *Patterson v. Esso Jamestown*, 274 F. Supp. 854, 859-60 (E.D. La. 1967).

142. *Van Carpals v. The S.S. American Harvester*, 297 F.2d 9 (2d Cir. 1961), *cert. denied*, 369 U.S. 865 (1962) (recovery for injury from steam escaping from valve being repaired); *Sprague v. Texas Co.*, 250 F.2d 123 (2d Cir. 1957) (recovery for injury from steam escaping from heater head being repaired); *Schell v. Chesapeake & O. Ry.*, 395 F.2d 676 (4th Cir. 1968) (recovery allowed for slip on grease that plaintiff was sent to clean up).

143. *Mesle v. Kea S.S. Corp.*, 260 F.2d 747 (3d Cir. 1958), *cert. denied*, 359 U.S. 966 (1959) (recovery allowed because plaintiff was repairing defect of structure other

A common ground of unseaworthiness liability involves the acts of a seaman¹⁴⁴ or "substitute seaman"¹⁴⁵ who is unfit in seamanship or in disposition, which cause injury to another. From time to time a plaintiff, whose own acts alone caused his injuries, has attempted to recover on the basis of his own unfitness as a seaman. Such attempts have always failed despite the fact that the plaintiff's acts, which caused his own injury, may not have been negligent.¹⁴⁶

Perhaps the most important limitation on the unseaworthiness liability of shipowners is the doctrine of instant unseaworthiness. Putting aside two 1967 decisions of the Supreme Court, which will be discussed later, it seems to be the settled rule in some circuits that a ship is not rendered unseaworthy merely by the presence aboard of a man who *acts* negligently, even if his negligent acts cause injury.¹⁴⁷ It is also the rule that a ship is rendered unseaworthy if a man's act causes an unseaworthy *condition* to arise which in turn causes injury or if his act results from an unfit *condition* of his own person. An act, then, is not itself considered to be an unseaworthy condition, even if it is negligent.¹⁴⁸ It is the distinction between an *act* and a *condition* which is the basis of the instant unseaworthiness doctrine, and it is the difficulty of making this distinction and the questionable

than that causing injury). See also *Hudson Waterways Corp. v. Schneider*, 365 F.2d 1012 (9th Cir. 1966) (recovery for injury from defective wiring in switch box of broken air compressor, other defects of which were being repaired — no statement as to whether the rule was accepted but did not apply to facts, or was not accepted at all).

144. See *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955); *Jones v. Lykes Bros. S.S. Co.*, 204 F.2d 815 (2d Cir. 1953); *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir.), *cert. denied*, 343 U.S. 966 (1952).

145. See *Smith v. Lauritzen*, 201 F. Supp. 663 (E.D. Pa. 1962). See also *Smith v. Lauritzen*, 356 F.2d 171 (3d Cir. 1966); *Berti v. Compagnie de Navigation Cyprien Fabre*, 213 F.2d 397 (2d Cir. 1954).

146. *Holmes v. Mississippi Shipping Co.*, 301 F.2d 474 (5th Cir. 1962) (no recovery where plaintiff seaman intentionally cut off his own hand during crazed fit); *Hill v. Flota Mercante Grancolombiana, S.A.*, 267 F. Supp. 380 (E.D. La. 1967) (no recovery where plaintiff injured because he was too fat to get through larger-than-standard hatch without difficulty).

147. Note, *The Doctrine of Unseaworthiness: Developing Restriction of the Act-Condition Dichotomy*, 21 *RUTGERS L. REV.* 322, 332 (1966). See, e.g., *Ezekiel v. Volusia S.S. Co.*, 297 F.2d 215 (2d Cir. 1961), *cert. denied*, 369 U.S. 843, *reh. denied*, 369 U.S. 891 (1962); *Pinto v. States Marine Corp.*, 296 F.2d 1 (2d Cir. 1961), *cert. denied*, 369 U.S. 843, *reh. denied*, 369 U.S. 891 (1962); *Berti v. Compagnie de Navigation Cyprien Fabre*, 213 F.2d 397 (2d Cir. 1954); *Koleris v. S.S. Good Hope*, 241 F. Supp. 967 (E.D. Va. 1965). These cases are merely cited as examples. They no longer represent the position of the Second and Fourth Circuits which have presumably overruled them on this point. See *Venable v. A/S Det Forenede Dampskibsselskab, No. 11,799* (4th Cir., June 12, 1968); *Alexander v. Bethlehem Steel Corp.*, 382 F.2d 963 (2d Cir. 1967); *Candiano v. Moore-McCormack Lines, Inc.*, 382 F.2d 961 (2d Cir. 1967).

148. See *Chaney v. City of Galveston*, 368 F.2d 774 (5th Cir. 1966) (plaintiff's own negligence); *Puddu v. Royal Netherlands S.S. Co.*, 303 F.2d 752 (2d Cir. 1962), *cert. denied*, 371 U.S. 840 (1962); *Williams v. The S.S. Richard De Larrinaga*, 287 F.2d 732 (4th Cir. 1961) (plaintiff's own negligence); *Donovan v. Esso Shipping Co.*, 259 F.2d 65 (3d Cir. 1958) (same); *Imperial Oil, Ltd. v. Drlik*, 234 F.2d 4 (6th Cir. 1956); *Nunes v. Farrell Lines, Inc.*, 227 F.2d 619 (1st Cir. 1955) (remanded for finding of whether cause of injury was plaintiff's own negligence or an unseaworthy condition). The *Puddu* and *Williams* cases have presumably been overruled by cases eliminating consideration of an act-condition distinction. See *Venable v. A/S Det Forenede Dampskibsselskab, No. 11,799* (4th Cir., June 12, 1968); *Alexander v. Bethlehem Steel Corp.*, 382 F.2d 963 (2d Cir. 1967); *Candiano v. Moore-McCormack Lines, Inc.*, 382 F.2d 961 (2d Cir. 1967).

grounds for doing so at all that have been the causes of considerable controversy in recent years.

The phrase itself — “instant unseaworthiness” — stems from the concept that, though an act may be considered an *instantaneous condition*, liability will not attach for such a short-lived “condition.”¹⁴⁹

149. The act-condition distinction was probably first expressly articulated in *Grillea v. United States*, 232 F.2d 919 (2d Cir. 1956). The Ninth and Fifth Circuits have adopted the “instant” or “instantaneous” unseaworthiness doctrine by name. See *Alaska S.S. Co. v. Garcia*, 378 F.2d 153, 155-56 (9th Cir. 1967); *Antoine v. Lake Charles Stevedores, Inc.*, 376 F.2d 443, 445 (5th Cir. 1967). The Ninth Circuit, however, has expressed doubts as to the validity of the doctrine in view of the trend of recent Supreme Court cases, and has stated that it now applies the doctrine cautiously. *Alaska S.S. Co. v. Garcia*, *supra*. While apparently not choosing to use the name “instant unseaworthiness,” the Second Circuit had adopted the act-condition distinction though it was troubled by the difficulty of making that distinction. See *Radovich v. Cunard S.S. Co.*, 364 F.2d 149 (2d Cir. 1966). The Second Circuit, however, has now rejected the act-condition distinction, feeling itself compelled to do so by the Supreme Court’s decision in *Masculi v. United States*, 387 U.S. 237 (1967). See *Alexander v. Bethlehem Steel Corp.*, 382 F.2d 963 (2d Cir. 1967); *Candiano v. Moore-McCormack Lines, Inc.*, 382 F.2d 961 (2d Cir. 1967). For a discussion of these Supreme Court and Second Circuit decisions see notes 213-40 *infra* and accompanying text.

The First, Fourth, and Sixth Circuits have apparently not explicitly adopted even the act-condition distinction, but have adopted what amounts to the same thing in distinguishing between unseaworthy equipment (liability) and improper use of seaworthy equipment (no liability), or between unseaworthiness (liability) and operational negligence (no liability). See *Scott v. Inbrandtsen Co.*, 327 F.2d 113 (4th Cir. 1964); *Arena v. Luckenbach S.S. Co.*, 279 F.2d 186 (1st Cir. 1960), *cert. denied*, 364 U.S. 895 (1960); *Penodo Cia Naviera S.A. v. Maniatis*, 262 F.2d 284 (4th Cir. 1959); *Imperial Oil, Ltd. v. Drlik*, 234 F.2d 4 (6th Cir. 1956). The Fourth Circuit’s *Scott* decision is puzzling. The court seems to toy with the idea of completely eliminating the distinction between unseaworthiness and operational negligence but really goes no further than holding that an unsafe condition of cargo, rendered such by an improper method of unloading, may be an unseaworthy condition, even though it is transitory. The court does not deal with the question of instantaneous unsafe conditions as exemplified by negligent acts continuing to the instant of injury. The *Scott* decision has been interpreted by one court as eliminating the operational negligence-unseaworthiness distinction, see *Radovich v. Cunard S.S. Co.*, 364 F.2d 149, 151 (2d Cir. 1966), but has been interpreted more narrowly by the Fourth Circuit itself, see *Venable v. A/S Det Forenede Dampskibsselskab*, No. 11,799 (4th Cir., June 12, 1968). In any case, the operational negligence-unseaworthiness distinction has now been completely eliminated by the Fourth Circuit’s decision in *Venable*, interpreting the Supreme Court’s *Masculi* opinion. See notes 213-40 *infra* and accompanying text for a discussion of the *Masculi* case and cases interpreting it.

The position of the Third Circuit is unclear. It seemed that the court had discarded the act-condition distinction in favor of a policy of holding shipowners liable for unseaworthiness for injury caused by the negligent use of seaworthy equipment. See *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir. 1964); *Ferrante v. Swedish American Lines*, 331 F.2d 571 (3d Cir.), *cert. dismissed*, 379 U.S. 801 (1964). In *Ferrante* the court stated that this policy was indicated by the trend of recent Supreme Court cases. In both of these cases, however, the same result (liability for unseaworthiness) might have been reached under the act-condition distinction, since in both cases an unseaworthy condition could have been found in an unsafe apparatus made from seaworthy equipment or in an unsafe method or course of conduct. Having presumably rejected the act-condition distinction, though in dictum, the Third Circuit surprisingly affirmed a district court decision for a defendant shipowner which was grounded on a distinction between operational negligence and unseaworthiness. See *Masculi v. United States*, 358 F.2d 133 (3d Cir. 1966). The Third Circuit has apparently not yet interpreted the Supreme Court’s reversal of its *Masculi* affirmance, as have the Second and Fourth Circuits.

For a discussion of what is said to be the “erosion” of the act-condition distinction and a prediction of its demise see Note, *The Doctrine of Unseaworthiness: Developing Restriction of the Act-Condition Dichotomy*, 21 RUTGERS L. REV. 322 (1967). See also Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 HARV. L. REV. 819 (1963).

In view of the seaman's remedy for negligence provided by the Jones Act and the business invitee's common law remedy for negligence, it might seem that the negligence-unseaworthiness or act-condition distinction is of little practical importance. Even if an act could itself constitute unseaworthiness, cases in which such an act would not also be negligent would probably be rather rare. Of importance, however, is the fact that injuries aboard ship are often caused by persons, such as longshoremen or other harbor workers, for whose negligent acts shipowners are not vicariously liable.¹⁵⁰ Thus, if injury to a seaman is caused by the act of a person for whom the shipowner is not legally responsible, the injured seaman could well find himself with a remedy, for which he must prove fault, only against a party perhaps less able to pay damages than the shipowner. If, however, such a person causes an unseaworthy condition to arise, which in turn causes injury to the seaman, the shipowner is liable. Under similar circumstances, an injured harbor worker would find himself required to prove the fault of a third-party tort-feasor, or would have to accept his probably less lucrative compensation remedy, if that third party's act caused his injury, but could recover from the shipowner if that act created an unseaworthy condition which caused his injury. The act-condition distinction, then, may be of great importance to injured plaintiffs and to shipowners.

Another situation in which the act-condition distinction may prove important is that in which a plaintiff has caused his own injury. It is clear that where it is found that the sole cause of injury was an *act* of the plaintiff himself, he is denied recovery for unseaworthiness,¹⁵¹ and, indeed, unless he is covered by a compensation statute, he is without a remedy of any kind. Where the act-condition distinction is drawn in such a case, liability is denied because of the absence of an unseaworthy condition. If the plaintiff's act is found to have been negligent, then unseaworthiness recovery may also be denied on the alternative ground of contributory negligence. Though contributory negligence is usually not a bar to recovery for unseaworthiness, but rather goes only to mitigate damages,¹⁵² damages would be mitigated 100% in such a case.¹⁵³ On the other hand, recovery has been *allowed* where it was assumed that the plaintiff caused or helped cause

150. The shipowner would, of course, be liable for the injury, however, if the negligence of one of his own employees or some unseaworthy condition also concurrently contributed to the causation of the injury. See Note, *Unseaworthiness, Operational Negligence, and the Death of the Longshoremen's and Harbor Workers' Compensation Act*, 43 NOTRE DAME LAWYER 550, 558 (1968).

151. See, e.g., *Chaney v. City of Galveston*, 368 F.2d 774 (5th Cir. 1966); *Guarrancino v. Luckenbach S.S. Co.*, 333 F.2d 646 (2d Cir. 1964), *cert. denied*, 379 U.S. 946 (1964); *Rawson v. Calmar S.S. Corp.*, 304 F.2d 202 (9th Cir. 1962); *Williams v. The S.S. Richard De Larrinaga*, 287 F.2d 732 (4th Cir. 1961); *Donovan v. Esso Shipping Co.*, 259 F.2d 65 (3d Cir. 1958); *Nunes v. Farrell Lines*, 227 F.2d 619 (1st Cir. 1955); *Taylor v. S.S. Helen Lykes*, 268 F. Supp. 932 (E.D. La. 1967). *Guarrancino* and *Williams* may no longer be authoritative in view of the Second and Fourth Circuits' decisions in *Venable v. A/S Det Forenede Dampskibsselskab*, No. 11,799 (4th Cir., June 12, 1968); *Alexander v. Bethlehem Steel Corp.*, 382 F.2d 963 (2d Cir. 1967); and *Candiano v. Moore-McCormack Lines, Inc.*, 382 F.2d 961 (2d Cir. 1967), which reject the act-condition distinction.

152. See note 34 *supra*.

153. *Donovan v. Esso Shipping Co.*, 259 F.2d 65 (3d Cir. 1958).

an unseaworthy *condition* to arise, which in turn caused his injury.¹⁵⁴ The law is not settled, however, as to whether damages must be totally mitigated where a plaintiff's negligent acts have been the *sole* cause of the creation of an unseaworthy *condition* which, in turn, caused his injury. One case has held that in such a situation damages need not be totally mitigated,¹⁵⁵ but this view has been criticized. If the former view prevails, however, the act-condition distinction is of great importance to plaintiffs who cause their own injuries, for the distinction will determine if damages are to be mitigated 100%.

It is clear, then, that the act-condition distinction, if made, is important to the law of unseaworthiness. Putting aside, again, discussion of recent Supreme Court decisions that may have eliminated the basis of this distinction, let us examine the distinction to see if it *should* be eliminated from the law.

The act-condition distinction has proved difficult to draw.¹⁵⁶ It has apparently been discarded in the Second, Third and Fourth Circuits¹⁵⁷ and has been questioned elsewhere.¹⁵⁸ In deference to the critics of the distinction, it does seem that a ship which has aboard a man who does not use the care of a reasonable man under the circumstances is in some sense inadequate.¹⁵⁹ If this reasoning is the ground for allowing acts to be the basis of a finding of unseaworthiness, then a finding of unseaworthiness based on an act will require a prior determination of negligence. Perhaps making unseaworthiness liability turn on a finding of negligence is justified where no other unseaworthy condition exists and injury is caused solely by an act. To draw the seaworthiness-unseaworthiness line at negligence, however, would require that the difficult act-condition distinction still be made, since it is clear that unreasonably unsafe *conditions* give

154. *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir. 1964), *cert. denied*, 379 U.S. 913 (1964) (dictum); *Knox v. United States Lines Co.*, 294 F.2d 354 (3d Cir. 1961) (judgment for defendant reversed and new trial awarded to plaintiff without adverting to fact that plaintiff may have helped cause the condition by helping to unload unevenly); *Grillea v. United States*, 232 F.2d 919 (2d Cir. 1956) (recovery granted although it was assumed that plaintiff and fellow servant were persons who misplaced cover on hatch through which plaintiff fell); *Holley v. The Manfred Stansfield*, 186 F. Supp. 212 (E.D. Va. 1960) (recovery granted although plaintiff was using "payloader" contrary to instructions and created overhang of solidified potash that later fell on him).

155. *Holley v. The Manfred Stansfield*, 186 F. Supp. 212 (E.D. Va. 1960). *Contra*, *Donovan v. Esso Shipping Co.*, 259 F.2d 65 (3d Cir. 1958). The *Holley* decision has been discussed in *Cavelleri v. Isthmian Lines, Inc.*, 190 F. Supp. 801 (S.D.N.Y. 1961), where it was said that if the case is interpreted as holding that the plaintiff could recover because his negligence activated a latently unsafe condition, then the decision is proper in mitigating damages only 50%, but that if the case is interpreted as holding that the plaintiff's negligence was the *sole* cause of the unseaworthy condition which caused his injury, then the case reached an anomalous result.

156. *Radovich v. Cunard S.S. Co.*, 364 F.2d 149 (2d Cir. 1966) (majority and dissent agree on difficulties); *Skibinski v. Waterman S.S. Corp.*, 360 F.2d 539 (2d Cir. 1966) (dissenting opinion); *Forkin v. Furness Withy & Co.*, 323 F.2d 638 (2d Cir. 1963). The court in *Taylor v. S.S. Helen Lykes*, 268 F. Supp. 932 (E.D. La. 1967), stated, however, that although the distinction was difficult to articulate verbally, it was workable when applied to facts.

157. See note 149 *supra*.

158. See *Alaska S.S. Co. v. Garcia*, 378 F.2d 153 (9th Cir. 1967); M. NORRIS, *MARITIME PERSONAL INJURIES* § 38, at 79-80 (2d ed. 1966).

159. See Note, *The Doctrine of Unseaworthiness: Developing Restriction of the Act-Condition Dichotomy*, 21 *RUTGERS L. REV.* 322, 338 (1967).

rise to unseaworthiness liability whether negligently¹⁶⁰ or innocently¹⁶¹ created. It seems that the difficulty of making the act-condition distinction causes considerable litigation in this area of the law and that only by totally eliminating the distinction will this burden on courts and litigants be significantly reduced. It has also been argued that the act-condition distinction should be completely discarded, and not pinned to a finding of negligence, because, from the standpoint of the plaintiff, at the instant of injury a vessel may be every bit as dangerous as a result of an act, whether negligent or not, as it would have been as a result of some condition that had existed for a longer period of time.¹⁶² Moreover, to make unseaworthiness liability for acts turn on a finding of negligence would presumably run afoul of the Supreme Court's command that there be a "complete divorcement of unseaworthiness liability from concepts of negligence."¹⁶³

Since acts causing injury aboard ship are often performed by men for whose acts, even if negligent, the shipowner is not presently liable, unless they create unseaworthy conditions, the effect of abandoning the act-condition distinction will necessarily be to increase the liability of shipowners. This would seem to be a logical extension of the present rule, however, since the shipowner is already liable for unseaworthy conditions created or brought aboard by such persons despite the shipowner's lack of fault or relinquishment of control.¹⁶⁴ Before the distinction is discarded on theoretical grounds, however, it would be well to consider that the increased burden on the shipowner would be substantial in view of the fact that he is also liable for injury, caused by unseaworthiness, to harbor workers and that danger to harbor workers, particularly longshoremen, is great even when their duties are performed on a ship free of unseaworthy conditions.

Whether or not the act-condition distinction *should* be drawn, in actual practice it has proved difficult to draw. Some factual situations clearly exhibit the existence of a *condition* causing injury; many of these have been pointed out above in the section discussing the expansion of the doctrine. In other factual situations, however, the act-condition line is extremely difficult to draw.

Courts have stated that the act-condition issue is to be decided by determining whether or not the act in question has ended, or come to rest, before the injury occurred.¹⁶⁵ One line of reasoning, which goes far to obliterate the distinction between act and condition, is the rule that if an unsafe act is performed pursuant to a plan, method,

160. See *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

161. See *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

162. M. NORRIS, *MARITIME PERSONAL INJURIES* § 38, at 77 (2d ed. 1966). See also Note, *The Doctrine of Unseaworthiness: Developing Restriction of the Act-Condition Dichotomy*, 21 *RUTGERS L. REV.* 322, 337-38 (1967).

163. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960).

164. See notes 76-81 *supra* and accompanying text.

165. *Robichaux v. Kerr McGee Oil Industries, Inc.*, 376 F.2d 447 (5th Cir. 1967); *Antoine v. Lake Charles Stevedores, Inc.*, 376 F.2d 443 (5th Cir. 1967); *Radovich v. Cunard S.S. Co.*, 364 F.2d 149 (2d Cir. 1966); *Beeler v. Alaska Aggregate Corp.*, 336 F.2d 108 (9th Cir. 1964); *Billeci v. United States*, 298 F.2d 703 (9th Cir. 1962); Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 *HARV. L. REV.* 819 (1963).

or course of operation put into execution prior to injury, then the operative act is the initiation of the plan. Since the act of initiation would have come to rest prior to injury, it is reasoned that the injury was caused by a condition, not by an act. This line of reasoning is found, in varying degrees, in a number of decisions by federal courts.¹⁶⁶ These cases all involve the use of equipment not in itself defective, but dangerous because of the way in which it has been or is being used. They run the factual gamut from static positioning of equipment in an unsafe manner, such as an unsteady pile of auto chassis dangerous when stepped upon,¹⁶⁷ to an active use of equipment in an unsafe manner, such as lifting four bales in a load safe for only two.¹⁶⁸ The problem in these cases is the difficulty of deciding whether an unsafe act is an aberration of an otherwise safe plan, or the beginning of a new, unsafe plan,¹⁶⁹ or whether there has been faulty execution of a safe plan or adequate execution of an unsafe plan.¹⁷⁰ There is also a question of the effect of the consideration of whether the plan was originated by the actor, the supervisor or possibly a third party.¹⁷¹

The picture is further clouded by those cases which have held that injury caused by an improvident order by a superior does not give rise to unseaworthiness liability unless the superior is found to have been incompetent.¹⁷² What is the distinction between injuries caused by acts performed pursuant to a plan and those caused by acts performed pursuant to an order? Is not an order, at least usually, the embodiment of a plan, and does not the negligent act of the superior come to rest in the form of an unseaworthy condition when the words of the order have been uttered and the subordinate is about to act pursuant to them?

It would seem then that a distinction which allows a trier of fact to arbitrarily interpret a single factual situation as either an unsafe use of seaworthy equipment, not giving rise to liability, or as an unsafe method of operation or condition of non-defective equip-

166. *Morales v. City of Galveston*, 370 U.S. 165 (1962) (dictum — method or manner); *Radovich v. Cunard S.S. Co.*, 364 F.2d 149 (2d Cir. 1966) (plan); *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367 (9th Cir. 1964) (course of conduct); *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir. 1964), *cert. denied*, 379 U.S. 913 (1964) (method); *Scott v. Isbrandtsen Co.*, 327 F.2d 113 (4th Cir. 1964) (method); *Rich v. Ellerman & Bucknall S.S. Co.*, 278 F.2d 704 (2d Cir. 1960) (manner); *Robillard v. A.L. Burbank & Co., Ltd.*, 186 F. Supp. 193 (S.D.N.Y. 1960) (method).

167. See *Rich v. Ellerman & Bucknall S.S. Co.*, 278 F.2d 704 (2d Cir. 1960).

168. See *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367 (9th Cir. 1964).

169. See *Radovich v. Cunard S.S. Co.*, 364 F.2d 149 (2d Cir. 1966); *Spinelli v. Isthmian S.S. Co.*, 326 F.2d 870 (2d Cir. 1964), *cert. denied*, 377 U.S. 935 (1964).

170. See *Radovich v. Cunard S.S. Co.*, 364 F.2d 149 (2d Cir. 1966); *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367 (9th Cir. 1964); *Taylor v. S.S. Helen Lykes*, 268 F. Supp. 932 (E.D. La. 1967).

171. 41 *Sr. JOHN'S L. REV.* 602, 609 (1967) (noting *Radovich*).

172. *Pinto v. States Marine Corp.*, 296 F.2d 1 (2d Cir. 1961), *cert. denied*, 369 U.S. 843, *reh. denied*, 369 U.S. 891 (1962); *Koleris v. S.S. Good Hope*, 241 F. Supp. 967 (E.D. Va. 1965); G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6-39, at 320 (1957): "The only case which is today clearly outside the scope of the unseaworthiness doctrine is the almost theoretical construct of an injury whose only cause is an order improvidently given by a concededly competent officer on a ship admitted to be in all respects seaworthy." *But see Di Salvo v. Cunard S.S. Co.*, 171 F. Supp. 813 (S.D.N.Y. 1959) (captain's order caused unseaworthy course of conduct).

ment, giving rise to liability, is a distinction without a difference. It would seem more reasonable to merely look to the cause of injury as a whole, regardless of what it might consist, and decide if it was unreasonably unsafe.

Perhaps the basis of the instant unseaworthiness doctrine is not merely the act-condition distinction but rather the distinction between an unseaworthy condition and *any* other causative factor. As mentioned earlier, in *Morales v. City of Galveston*¹⁷³ the Supreme Court affirmed a judgment of no liability for injury from noxious fumes from the last "shot" of grain loaded into a hold, despite the fact that the ship was not equipped with ventilators. The Court characterized the cause of injury as an unforeseeable outside agent. Accepting this characterization, the result is logical, for an unforeseeable outside agent cannot, by definition, be an unseaworthy condition of a vessel since it is an outside agent; moreover, since a ship need be only reasonably fit for its *intended* use, activity to overcome an unforeseeable outside agent cannot, by definition, be an intended use. The close question in *Morales*, however, was whether the noxious fumes from the cargo were an outside agent or a condition of the ship. The Court did not mention the instant unseaworthiness doctrine, but the majority opinion in the court below referred to the fact that the vessel was only instantaneously unfit.¹⁷⁴ Thus *Morales* may be interpreted as an application of the instant unseaworthiness doctrine.¹⁷⁵ It would seem, then, that the rule can be stated thusly: if an unforeseeable outside agent creates an unseaworthy condition aboard ship which in turn creates injury, the shipowner is liable. Moreover, it seems logical to conclude that a vessel's facing of a foreseeable and avoidable dangerous agent or force, from without or within, and its failure to overcome it, is an unseaworthy condition of the vessel; some lower courts have so held.¹⁷⁶ It would seem, then, that even if the act-condition distinction is discarded, a distinction must still be made between an unseaworthy condition of a vessel and an unforeseeable outside agent that instantaneously exerts its harmful influence aboard ship.

THE SUPREME COURT AND INSTANT UNSEAWORTHINESS

A number of judges have stated that recent decisions by the Supreme Court have undermined the act-condition distinction.¹⁷⁷ Though this view may be supported by the general *trend* of recent decisions towards ever-widening coverage, the Court has never ex-

173. 370 U.S. 165 (1962).

174. *Morales v. City of Galveston*, 291 F.2d 97, 98 (5th Cir. 1961).

175. See notes 147-49 *supra* and accompanying text.

176. See *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193 (5th Cir. 1967); *Walker v. Harris*, 335 F.2d 185 (5th Cir.), *cert. denied*, 379 U.S. 930 (1964); *Texas Menhaden Co. v. Johnson*, 332 F.2d 527 (5th Cir. 1964). See also *Morales v. City of Galveston*, 370 U.S. 165 (1962) (the dissent argued that the ship was unseaworthy because it was unfit to protect against outside agent which *dissent* felt was *foreseeable*).

177. See *Alaska S.S. Co. v. Garcia*, 378 F.2d 153 (9th Cir. 1967); *Ferrante v. Swedish American Lines*, 331 F.2d 571 (3d Cir.), *cert. dismissed*, 379 U.S. 801 (1964).

plicitly adopted or rejected the distinction.¹⁷⁸ The Court perhaps came closest to expressly distinguishing acts from conditions in its 1903 decision in the *The Osceola*,¹⁷⁹ where it distinguished between operational negligence and unseaworthiness. Other decisions of the Court have avoided the issue, but have not found unseaworthiness in cases where an unsafe condition could not be found. In *Boudoin v. Lykes Bros. Steamship Co.*,¹⁸⁰ the Court allowed recovery for injury caused by a willful act of assault, but stated that recovery was allowed only because the assailant was found to be unequal in disposition to the ordinary man of the calling, an unseaworthy condition. In *Crumady v. The Joachin Hendrik Fisser*¹⁸¹ the Court awarded recovery for injury caused by the improper use of proper equipment, but the facts were such that the acts of usage were found to have rendered the condition of the equipment unsafe. Finally, in *Morales v. City of Galveston*,¹⁸² the Court did state that unseaworthiness could be found in an improper manner or method of doing something, but it is reasonable to assume that the Court was speaking of a manner or method that could be interpreted, not as an act, but as a condition.

Two recent Supreme Court decisions, *Waldron v. Moore-McCormack Lines, Inc.*¹⁸³ and *Masculi v. United States*,¹⁸⁴ have left ambiguous the Court's position on the act-condition distinction. The *Waldron* decision extended the scope of the unseaworthiness doctrine by resolving a specific conflict among the circuits,¹⁸⁵ but this conflict presumably did not involve the act-condition distinction. Petitioner was a member of the crew of respondent's ship. He and four other seamen were engaged in a docking operation at the stern of the vessel as it approached a pier. At the last minute the mate in charge was ordered to ready an additional mooring line. He ordered the petitioner and one other crewman to uncoil a heavy eight-inch line and carry it to the side of the ship. While uncoiling the line petitioner fell and injured his back. At the trial, "[t]here was expert evidence¹⁸⁶ to the effect that three or four men rather than two were required to carry the line in order to constitute 'safe and prudent seamanship'."¹⁸⁷ Petitioner's only contentions were that the mate's assignment of too few men to do the particular job of uncoiling and carrying the line

178. *Antoine v. Lake Charles Stevedores, Inc.*, 376 F.2d 443 (5th Cir. 1967); *Radovich v. Cunard S.S. Co.*, 364 F.2d 149 (2d Cir. 1966) (dissenting opinion).

179. 189 U.S. 158 (1903).

180. 348 U.S. 336 (1955).

181. 358 U.S. 423 (1959).

182. 370 U.S. 165 (1962).

183. 386 U.S. 724 (1967).

184. 387 U.S. 237 (1967).

185. Certiorari was granted by the Supreme Court in order to resolve a supposed conflict between the *Waldron* decision in the Second Circuit and that of *American President Lines, Ltd. v. Redfern*, 345 F.2d 629 (9th Cir. 1965), and other cases noted by the Court in 386 U.S. at 724 n.2.

186. The Supreme Court has held that expert testimony of customary equipment is not required for a finding of unseaworthiness and, if offered, does not conclusively decide the issue. *Salem v. United States Lines Co.*, 370 U.S. 21, 37 n.6 (1962). For a discussion of the relation of customary standards to unseaworthiness liability see note 132 *supra* and accompanying text.

187. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 725 (1967) (footnote added), quoting below, *Waldron v. Moore-McCormack Lines, Inc.*, 356 F.2d 247, 248 (2d Cir. 1966) (same).

constituted negligence and that the assignment of too few men in this situation rendered the vessel unseaworthy. The United States district court allowed the issue of negligence to go to the jury, which found that there had been no negligence, but the court granted a directed verdict for defendant on the issue of unseaworthiness. The Court of Appeals for the Second Circuit affirmed, with one judge dissenting, stating that there can be no unseaworthiness recovery for injury caused solely by an *act* or *omission* of a competent crew member and holding, more narrowly, that there can be no unseaworthiness recovery for injury caused solely by an *order* of a competent ship's officer. The court's statement is essentially a restatement of the instant unseaworthiness doctrine, and its holding is a more specific rule within that doctrine.

The Supreme Court reversed; speaking for the Court, Mr. Justice Black stated: "The basic issue here is whether there is any justification, consistent with the broad remedial purposes of the doctrine of unseaworthiness, for drawing a distinction between the ship's equipment, on the one hand, and its personnel, on the other."¹⁸⁸ The Court concluded that there was no justification for drawing such a line in the present case. It noted that had the cause of injury been an order to lift the line by means of defective equipment, sound equipment improperly used, or incompetent help, the ship would have been rendered unseaworthy, regardless of negligence, under existing precedent.¹⁸⁹ The Court reasoned, therefore, that the improper use of men rather than equipment and the use of too few men rather than incompetent men could constitute unseaworthiness as well. The Court also noted that the availability of sufficient competent men elsewhere aboard would not relieve the shipowner of the duty to provide sufficient competent men when and where the specific job was to be done.

In justification of its decision the Court stated that its analysis was "required by a clear recognition of the needs of the seaman for protection from dangerous conditions beyond his control and the role of the unseaworthiness doctrine which, by shifting the risk to the shipowner, provides that protection."¹⁹⁰ Referring to its own previous decisions the Court stated that:

[W]e noted that "the hazards of maritime service, the helplessness of the men to ward off the perils of unseaworthiness, the harsh-

188. 386 U.S. at 726.

189. The Court here does not cite authority for this statement. Presumably the Court was referring to such cases as *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962) (defective bands on bales); *Alaska S.S. Co. v. Petterson*, 347 U.S. 396 (1954) (defective snatch block); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) (latently defective steel shackle); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) (rotten rope); *Crumady v. The J.H. Fisser*, 358 U.S. 423 (1959) (improper setting on otherwise fit electric circuit breaker); *Morales v. City of Galveston*, 370 U.S. 165 (1962) (dictum — improper method of loading); *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955) (assault by an assailant not equal in disposition or seamanship to ordinary men of the calling). Only in the *Mahnich* case did the Court particularly refer to the fact that the unseaworthy condition found was caused by an order and in that case the unseaworthy defect was not so much in the order as in the defective equipment used pursuant to it. In *Waldron*, however, the situations used as examples of obviously unseaworthy conditions all involved uses of men or equipment pursuant to an order or assignment.

190. 386 U.S. at 728.

ness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of unseaworthiness," . . . should prevent the shipowner from delegating, shifting, or escaping his duty by using the men or gear of others to perform the ship's work. By the same token, the shipowner should not be able to escape liability merely because he has used men rather than machines or physical equipment to perform that work.¹⁹¹

In view of the expansion of the doctrine of unseaworthiness in past decisions and the policy basis for that expansion, the *Waldron* decision probably comes as no surprise to the admiralty bar. Although some may disagree with the validity of these policy arguments and the need to apply them in the instant situation, these policies seem to be firmly entrenched in the thinking of at least a majority of the Court.¹⁹² It must be admitted that the distinction between too little equipment and too few men is tenuous.¹⁹³ The classic definition of seaworthiness, "a vessel reasonably suitable for her intended service,"¹⁹⁴ is certainly broad enough to encompass the fitness of procedures involving the use of men in general, and of too few men in particular, and such uses pursuant to the orders of ship's officers.

Having decided that the assignment of too few men to do a particular job may be unseaworthiness, the Court in *Waldron* reasserted the *Mitchell* doctrine that if a transitory unseaworthy condition is found to have caused injury, then liability will attach whether the condition was negligently or innocently created. The jury finding, that the mate's order which created the potentially unseaworthy condition was not negligently given, was held irrelevant to unseaworthiness liability, and the Court remanded the case for a jury determination of the unseaworthiness issue.

The narrowest interpretation of the *Waldron* holding is that the use, pursuant to an order, of too few men to do a particular job may be an unseaworthy condition. Under this interpretation, the decision is only a slight advancement of prior law and represents no basic change in theory. The case of *Mahnich v. Southern S.S. Co.*, discussed earlier, held that a defective rope used pursuant to an order constituted unseaworthiness. There have been a number of cases in which a method of carrying out what was termed a "plan" or "course of conduct" was held to warrant a finding of an unseaworthy condition. The *Waldron* decision went beyond those cases because it involved only the use of personnel, whereas apparently all prior cases had involved some element of equipment usage.

Perhaps the *Waldron* holding may be somewhat expanded to include as possible unseaworthy conditions all operations in which men are improperly used or too few of them are used, even though the

191. *Id.*

192. The dissent's disagreement with the majority did not involve, at least expressly, the policy rationale that should underlie the law of unseaworthiness. For a discussion of the issue that was the point of disagreement see pp. 281-85 *infra*.

193. See 66 COLUM. L. REV. 1180, 1182 (1966) (commenting on *Waldron* decision by the Second Circuit).

194. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960). For a discussion of other definitions of the concept see note 67 *supra*.

operation is conducted spontaneously by the men and not pursuant to an order. This interpretation would not seem overly broad since unseaworthy conditions may be found in situations involving the use of equipment where that use was not pursuant to an order. Perhaps, also, the *Waldron* holding may be expanded to include as possible unseaworthy conditions all operations in which anything causing injury is done pursuant to order. Although it is not entirely clear, the decision would seem to overrule completely the rule formulated in some prior cases,¹⁹⁵ which the Second Circuit in *Waldron* had stated as its holding, namely: "[I]f the shipowner has furnished a well-manned ship, with a competent crew, there can be no liability for personal injuries caused by an *order* of an officer of the ship that is not proved to be such as would not have been made by a reasonably prudent man under the circumstances."¹⁹⁶ The Supreme Court's opinion in *Waldron* clearly indicates that at least in some enumerated factual situations the fact that injury is caused by an order does not relieve a shipowner of unseaworthiness liability. Though the Court does not refer to the act-condition distinction, it may be presumed that the *Waldron* decision at least stands for the proposition that an order *may* cause an unseaworthy condition to arise in the use of equipment *or* personnel and that if such an unseaworthy condition is created, the fact that it was caused by an order or that the order was not negligently given is irrelevant. It is not clear, however, that the Court has decided that all orders create conditions for which liability will attach if they are found to be unseaworthy. Perhaps a factual situation might still arise where injury could be found to have been caused by an order but where the order caused no condition to arise. The Court's opinion, however, states that unseaworthiness may be found where an order involves defective or improperly used equipment or personnel. It would seem that this conclusion logically encompasses all possible factual situations. If the order in *Waldron* caused an unsafe condition to arise as men set about to carry it out, then *any* order could be as easily interpreted to have created a condition, unless perhaps it could somehow be found that the order caused injury *instantaneously*. It would seem, therefore, that in *Waldron*, the rule that injuries caused by orders do not give rise to unseaworthiness liability has been for all intents and purposes overruled. If this is true, when injuries are caused by acts carried out pursuant to orders the only question to be asked is whether the condition created by the order was in fact unseaworthy.

The question remains, however, whether the *Waldron* case should even be limited to conditions caused by orders. Quoting from the opinion of the Second Circuit, the Supreme Court stated that the holding of that court was: "If someone is injured solely by reason of an act or omission on the part of any member of a crew found to be possessed of the competence of men of his calling, there can be no recovery unless the act or omission is proved to be negligent."¹⁹⁷

195. See note 172 *supra* and accompanying text.

196. 356 F.2d at 251 (emphasis added).

197. 386 U.S. at 725, quoting below, 356 F.2d at 251.

Though the Second Circuit's opinion included this statement, its express *holding* was stated more narrowly. The quotation which the Supreme Court selected as the holding of the circuit court decision is a statement of the instant unseaworthiness rule, except as it applies to outside agents, though it does not expressly refer to the act-condition distinction. By so stating the holding of the Second Circuit's decision and then reversing that decision, has the Court overruled the instant unseaworthiness doctrine? The Court did not do so expressly; indeed, after quoting the rule, the Court did not refer to it again but stated only that the Second Circuit erred in failing to obey the *Mitchell* command to divorce unseaworthiness liability from concepts of negligence. Since the reported facts seem to indicate that, upon remand, a jury could find that the mate's order caused an unseaworthy *condition* to arise, and since the Court seems to have taken issue only with the Second Circuit's use of concepts of negligence, it would seem that the *Waldron* decision should not be taken as impliedly overruling the instant unseaworthiness doctrine. Long-established doctrines should not be deemed to be overruled by implication. The better, more conservative view would be that the *Waldron* Court felt that the Second Circuit had violated *Mitchell* by applying concepts of negligence to a situation arguably involving, not merely an act causing instantaneous injury, but a transitory unsafe condition. Under this interpretation, upon remand, the jury must determine whether a condition was created and whether, without reference to the standard of negligence, that condition rendered the vessel unseaworthy. What the Supreme Court was probably trying to do in broadening the holding below was to simply say that the condition question may go to the jury whether or not the defective use of personnel resulted from an order.

An argument can be made, however, for a broader interpretation of the *Waldron* holding which would not require that the jury be asked whether a condition had been created. Since the Second Circuit below treated the case as one involving injury caused solely by an *act*, and since the Supreme Court did not expressly refer to the act-condition distinction or state that the court of appeals' error was in failing to see that an unsafe *condition* had been created, it can be argued that the Court simply was not concerned with whether injury was caused by what might be called an act and that its opinion indicates that whenever injury is caused aboard ship, a plaintiff is to be given an opportunity to have the trier of fact decide whether his injury was caused by an unreasonable unfitness of the vessel, embodied in an act or a condition. Under such an interpretation, the *Waldron* opinion implies that, in the Court's view, unsafe *acts* are not always such that reasonable men would agree that an otherwise safe ship on which they occur is necessarily reasonably fit. Such an interpretation would, therefore, overrule the instant unseaworthiness doctrine and the act-condition distinction.¹⁹⁸ In view of the remand in *Waldron*,

198. The *Waldron* decision has apparently been interpreted by the Fourth Circuit as overruling the act-condition distinction: "It is now settled that the negligent misuse of safe and sufficient equipment renders a vessel unseaworthy [citing *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 727 (1967)]." *Venable v. A/S Det Forenede Dampskibsselskab*, No. 11,799, at 6 (4th Cir., June 12, 1968).

it would also indicate that as to acts, as with conditions, unseaworthiness does not depend on negligence. Such a broad interpretation, however, is not required by the *Waldron* opinion or its result. The act-condition distinction should continue to be decisive, at least in cases of assaults by competent crew members. To what extent liability will be denied because injury resulted directly from the act of a seaman, without a plan or order which can be said to have created a condition, perhaps remains an open question.

A final issue decided by the Court in *Waldron* was that the error below was reversible despite the unquestioned jury verdict for defendant on the issue of negligence. The dissenters argued that, accepting the majority's view of the law, the error, if any, was *harmless*, since under the circumstances of the case, a finding of a lack of negligence amounted to a finding of seaworthiness. They argued that, where the sole cause of injury was admittedly the issuance of an order assigning a certain number of men to do a job, in the absence of "special circumstances," a finding of lack of negligence in the issuance of the order is synonymous with a finding that the assignment was not imprudent seamanship. The dissent reasoned that the jury verdict merely indicated that the jury did not believe or accept the testimony of the defendant's expert as to the number of men required to do the job assigned in reasonable safety.

A commentator¹⁹⁹ has suggested that the finding of reasonable care could allow a consistent finding of unseaworthiness in *Waldron* only if it were also found that the mate found himself in an emergency situation when delivering his order. The law of negligence requires a finding of negligence only if the actor is found to have failed to exercise the care of a reasonable man under the circumstances. In an emergency the rule does not change, but one of the circumstances to be considered is that of the emergency, in which a reasonable man is not expected to exercise the same quality of judgment that might be expected of him under normal circumstances. Thus, the jury could have found that in the emergency the mate exercised reasonable care and yet was mistaken. In conjunction with a finding of emergency, a finding of reasonable care could mean that the jury felt either that the mate was correct in opting for a situation that was reasonably safe or that he made a mistake, by deciding on a course of conduct not reasonably safe, but was excused under the circumstances. The argument is made that only in the latter case could the vessel have been unseaworthy where the mate acted reasonably. It would appear that the dissent felt that, *as a matter of law*, the mate was not faced by an emergency — that there were "no such special facts."²⁰⁰ It has been suggested, however, that the dissent was in error and that there was sufficient evidence of an emergency introduced to take the emergency issue to the jury. It is argued that "the remand in this case should have required the trial judge to instruct the jury that they may decide the issue of unseaworthiness only if they find that an extra-

199. 36 *FORDHAM L. REV.* 348 (1967).

200. 386 U.S. at 729.

ordinary, *i.e.*, emergency, situation existed."²⁰¹ But in fact no such instructions were given to the trial court upon remand.

The fallacy of this argument and of that of the dissent is that both *require* the jury to view the scene through the eyes of the mate. This seems to be a form of the "marriage" of unseaworthiness with concepts of negligence that has been condemned by the majority in both the *Mitchell* and *Waldron* cases. The question to be decided by the jury on the issue of unseaworthiness is not whether the mate acted with reasonable prudence — exercised reasonable judgment and caution — in creating a condition which caused an injury; the question is rather whether the condition created was reasonably safe in view of the intended course of operations. It is submitted that the trier of fact should not be restricted in his view of the facts to that of the mate or of any other particular observer at the scene of the accident.

As was described in the last section, some difficulty has been encountered in trying to apply the "reasonable fitness" test to factual situations. Although various specific rules, such as those requiring a finding of negligence, of more than a transitory condition, or of the improper use of equipment and not merely personnel, have been rejected by the Supreme Court, the guidance of the jury need not stop at the blanket definition of seaworthiness as "reasonable fitness for intended use." The Court of Appeals for the Fifth Circuit said: "Reasonable suitability of ship and equipment is spelled out in terms of matching operating proficiency against anticipated operating conditions."²⁰² Or, more fully:

The subsidiary questions leading to ultimate conclusion of seaworthiness are therefore: What is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny, sufficient to withstand those anticipated forces? If the answer is in the affirmative, the vessel (or its fitting) is seaworthy. If the answer is in the negative, then the vessel (or the fitting) is unseaworthy no matter how diligent, careful, or prudent the owner might have been.²⁰³

This formulation is flexible and allows for the fact that unseaworthiness is a relative term.²⁰⁴ The term is relative in that the absence of a guard rail might render a vessel unseaworthy at sea but not while

201. 36 FORDHAM L. REV. 348, 352 (1967).

202. *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193, 196 (5th Cir. 1967), quoting *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609 (5th Cir. 1966).

203. *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193, 196 (5th Cir. 1967), quoting *Walker v. Harris*, 335 F.2d 185, 191 (5th Cir.), *cert. denied*, 379 U.S. 930 (1964).

204. *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193, 196 (5th Cir. 1967); *Shenker v. United States*, 322 F.2d 622 (2d Cir. 1963), *cert. denied*, 376 U.S. 907 (1964) (vessel held unseaworthy as a result of dunnage lying on hatch cover serving no purpose); *Walker v. Sinclair Ref. Co.*, 320 F.2d 302 (3d Cir. 1963); *Mesle v. Kea S.S. Corp.*, 260 F.2d 747 (3d Cir. 1958), *cert. denied*, 359 U.S. 966 (1959) (shores designed to prevent cargo from shifting at sea must also be fit to be torn down safely); *Brown v. Dravo Corp.*, 258 F.2d 704 (3d Cir. 1958), *cert. denied*, 359 U.S. 960 (1959); *Lester v. United States*, 234 F.2d 625 (2d Cir. 1956); *Hanrahan v. Pacific Transport Co.*, 262 F. 951 (2d Cir. 1919).

motionless in dry dock undergoing repairs.²⁰⁵ Reasonable fitness is required only for an intended use under the circumstances present, and the Fifth Circuit formulation allows for this. It also does not preclude the retention of the instant unseaworthiness rule if such is desired.

Despite occasional decisions finding seaworthiness or unseaworthiness as a matter of law, the issue is usually treated as one of fact,²⁰⁶

205. *Lester v. United States*, 234 F.2d 625 (2d Cir. 1956); *cf. Hanrahan v. Pacific Transport Co.*, 262 F. 951, 952 (2d Cir. 1919) (lack of hand rail may render ship unseaworthy for rough water but not for discharging cargo while lying alongside wharf).

206. It has often been said that unseaworthiness is ordinarily a question of fact. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609 (5th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967); *Knox v. United States Lines Co.*, 294 F.2d 354 (3d Cir. 1961); *Morales v. City of Galveston*, 291 F.2d 97 (5th Cir. 1961), *aff'd*, 370 U.S. 165 (1962); *Bruszewski v. Isthmian S.S. Co.*, 163 F.2d 720 (3d Cir. 1947); *Krey v. United States*, 123 F.2d 1008 (2d Cir. 1941); *M. NORRIS, MARITIME PERSONAL INJURIES* § 45, at 98-99 (2d ed. 1966). Thus courts have left the issue of unseaworthiness to the jury, at least where the jury is properly instructed, *Blier v. United States Lines Co.*, 286 F.2d 920 (2d Cir. 1961), *cert. denied*, 368 U.S. 836 (1961), and where reasonable minds could differ on the issue, *Walker v. Sinclair Ref. Co.*, 320 F.2d 302 (3d Cir. 1963). In *McAllister v. United States*, 348 U.S. 19, 20 (1954), the Supreme Court ruled:

In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure. . . . A finding is clearly erroneous when, although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . .

The view that unseaworthiness is a question of fact is bolstered by appellate decisions that have applied the "clearly erroneous" rule. *See, e.g., Smith v. M/V Gisna*, 362 F.2d 164 (5th Cir. 1966); *Texas Menhaden Co. v. Johnson*, 332 F.2d 527 (5th Cir. 1964); *Castro v. Moore-McCormack Lines, Inc.*, 325 F.2d 72 (2d Cir. 1963); *Morales v. City of Galveston*, 291 F.2d 97 (5th Cir. 1961), *aff'd*, 370 U.S. 165 (1962). *See also* 41 ST. JOHN'S L. REV. 602 (1967). But the question of whether unseaworthiness is a question of fact or of law is not completely free of controversy. One view is that the trier of fact is to decide the facts both from the viewpoint of what happened and what conditions were present and from the viewpoint of whether the conditions present were reasonably fit and seaworthy. *Smith v. M/V Gisna*, 362 F.2d 164 (5th Cir. 1966). The other view is that, although the trier of fact must obviously decide what took place and what conditions were present and caused the injury, it is a question of law whether those conditions were unseaworthy. *Shenker v. United States*, 322 F.2d 622 (2d Cir. 1963) (Friendly, J., dissenting); *Van Carpals v. The S.S. American Harvester*, 297 F.2d 9 (2d Cir. 1961), *cert. denied*, 369 U.S. 865 (1962); *Krey v. United States*, 123 F.2d 1008 (2d Cir. 1941). It would seem that the former view is the majority view and has been endorsed by the Supreme Court in *Mitchell*, where the case was remanded for a jury determination of whether the unsafe condition was unseaworthy. *See also Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955) (affirming finding of unseaworthiness below). The Supreme Court has decided the issue of unseaworthiness as a matter of law but explained its action on the ground that the issue was decided as a matter of law below. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 98-99 (1944). In the same case, however, the Court stated that unseaworthiness is usually a question of fact. Other appellate courts have decided the issue of unseaworthiness as a matter of law in isolated cases. These cases have generally involved a failure of a piece of equipment where the evidence clearly showed that the equipment was being put to ordinary usage at the time, or at least where there had been no evidence of improper usage, *see Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193 (5th Cir. 1967); *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609 (5th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967); *Vega v. The Malula*, 291 F.2d 415 (5th Cir. 1961); *Sprague v. Texas Co.*, 250 F.2d 123 (2d Cir. 1957), or where a vessel succumbed to a foreseeable outside force, *see Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964).

It seems clear that in a case involving a distinction between an act and a condition, it is for the trier of fact to decide this question. *Robichaux v. Kerr McGee Oil Industries, Inc.*, 376 F.2d 447 (5th Cir. 1967); *Puddu v. Royal Netherlands S.S.*

both as to the decision of what actually took place and as to the decision of whether such facts constitute reasonable fitness. The law of unseaworthiness is marked by a reluctance of appellate courts to reverse the decisions of the trier of fact, which results in many affirmances.²⁰⁷ The appellate courts generally permit the trier of fact to view fitness in any reasonable way that seems appropriate under the circumstances. The Second Circuit has gone so far as to reverse a decision below because it felt that the trier of fact did not realize its freedom of perspective in deciding the case before it.²⁰⁸ The Supreme Court's decisions are consistent with this thesis. The Court has consistently stated, not that a certain condition *must* have been found unseaworthy, but that it *may* have been found unseaworthy and that certain particular limiting rules should not have been placed on the doctrine as a matter of law.²⁰⁹ Thus, the history of the law of unseaworthiness may be viewed not as an expansion by the Supreme Court but rather as a refusal to allow limitations to be placed upon what a trier of fact might reasonably perceive as unfitness.

This attitude is graphically represented by the *Mitchell* decision, which reversed a finding of no unseaworthiness for error in *requiring* a finding of prior notice of the slippery rail for unseaworthiness liability to attach, and the *Morales* decision, which affirmed a finding of no unseaworthiness where injury was found to be caused by an *unforeseeable* outside force. Presumably, the trier of facts in *Mitchell* might well have been affirmed had there been a finding of seaworthiness based upon proper instructions allowing a freedom of perspective as to what might constitute unfitness under the circumstances. Such a finding might well have been affirmed even though it was justified only by a finding that danger of injury from the conditions was not reasonably foreseeable or avoidable. A defect or other unfitness need not be foreseeable or avoidable to constitute unseaworthiness, but a trier of fact should be allowed to view situations as they normally are viewed to determine if injury was caused by an unfitness, or by some unforeseeable or unavoidable force or risk which a vessel may fail to overcome and yet still be considered fit.

In *McAllister v. Magnolia Petroleum Co.*,²¹⁰ the Court reversed a judgment for defendant, finding error in the instructions to the jury. The instructions given implied that the jury might find unseaworthiness only if it were to find that the alleged defect was of such a quality as to render the whole vessel unfit for its intended purpose. The Court's decision implies that the trier of facts must be allowed to focus

Co., 303 F.2d 752 (2d Cir.), *cert. denied*, 371 U.S. 840 (1962). See also *Titus v. The Santorini*, 258 F.2d 352 (9th Cir. 1958); Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 HARV. L. REV. 819, 828 (1963).

It would seem that unseaworthiness should be treated as an issue of fact except in cases where the particular facts are such that reasonable men could not disagree on the ultimate decision, and that appellate courts should restrict themselves to ensuring that juries are properly instructed and that trial courts have properly viewed the rules of unseaworthiness law.

207. See, e.g., cases cited in *Radovich v. Cunard S.S. Co.*, 364 F.2d 149, 152 (2d Cir. 1966).

208. See *Radovich v. Cunard S.S. Co.*, 364 F.2d 149 (2d Cir. 1966).

209. See notes 64-118 *supra* and accompanying text.

210. 357 U.S. 221 (1958).

on the particular aspects of the ship which seem appropriate under the circumstances. On the other hand, the naked remand in *Waldron*, which did not restrict the new trier of fact, may be interpreted as a ruling that a trier of fact is *not* to be restricted to focusing on only one aspect of the ship, here the mate's decision, from only one vantage point, here that of the mate. The trier of fact may consider the mate's fitness and his decision, but should be allowed to view the situation from the vantage point, not of any particular actor at the scene, but of an objective observer viewing any human actors as just another aspect of the total picture.²¹¹ This is perhaps what has been meant by courts stating that unseaworthiness should be decided under *all* of the circumstances.²¹²

Within a month of deciding *Waldron*, the Supreme Court handed down a per curiam opinion in *Masculi v. United States*.²¹³ The opinion states only that certiorari is granted and that the judgment is reversed and cites as authority *Mahnich v. Southern S.S. Co.*²¹⁴ and *Crumady v. The Joachin Hendrik Fisser*.²¹⁵ Justices Harlan, Stewart, and White opposed the granting of certiorari.

Masculi was a wrongful death action brought under the Pennsylvania statute against a shipowner, the United States, in the United States District Court for the Eastern District of Pennsylvania by the administratrix of the estate of a longshoreman. Death befell decedent, a tag line tender working on deck, when the non-defective, heavy-duty rig being used to load combat tanks was "tightlined" causing a shackle to part and part of the rig to recoil and fall upon him. The district court found for the shipowner on both the negligence and unseaworthiness issues, stating as a finding of fact:

35. In summary, the Court finds that the vessel and all of its equipment was in a seaworthy condition at all times, and remained so throughout the entire loading operations. The accident was caused solely by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause the accident to occur so *instantaneously* that the Third Officer was unable to warn anyone or prevent its happening.²¹⁶

The court went on at length to describe the excellence of the equipment in all respects and the overwhelming proof of its condition. It did not state whether the circuit breakers on the equipment were properly set but specifically concluded that the winch circuit breakers had no bearing on the causation of the accident in that the winch attached to the parted shackle was paying out when the accident

211. See Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 HARV. L. REV. 819, 827 (1963).

212. *International Navigation Co. v. Farr & Bailey Mfg. Co.*, 181 U.S. 218 (1901) (damage to cargo); *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193, 201 (5th Cir. 1967) (personal injury). See also *Carabellese v. Naviera Aznar, S.A.*, 285 F.2d 355 (2d Cir. 1960) (same).

213. 387 U.S. 237 (1967).

214. 321 U.S. 96 (1944). See notes 71-73 *supra* and accompanying text.

215. 358 U.S. 423 (1959). See note 84 *supra* and accompanying text.

216. *Masculi v. United States*, 241 F. Supp. 354, 362 (E.D. Pa. 1965) (emphasis added).

occurred, and was constructed in such a way that the circuit breakers would not operate in that position. The court found that, "13. . . . The only feasible explanation for permitting these individual vang's to become simultaneously taut, also known as tightlining, would be inadvertence or inattention in the operation of the vang winches."²¹⁷ It went on to conclude as a matter of law that the shipowner was not negligent and that, "12. . . . Libelant's proposed findings of fact (No. 10) concedes the accident occurred *instantaneously* and thus there was no time to issue any warnings or instructions to any of the winch operators or the signalman."²¹⁸ Clearly the court felt that it was deciding a case of pure operational negligence, instant unseaworthiness, for which liability should not attach. It stated:

18. This Court now finds in favor of the respondent, and it does not believe that its decision is contrary to those principles enunciated by the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States. The present case, in this Court's opinion, is a specie that belongs in that infinitesimal area that has been described *consistently* by all the Appellate Courts and the Supreme Court of the United States as one in which an owner is not obligated to furnish an accident-free ship.

19. The instant case is one that stands on its own facts, merits, and unusual circumstances, and consequently, has been analyzed thoroughly with a high degree of assiduity.²¹⁹

These words clearly indicate that the court realized the difficulty of finding a situation involving a truly instantaneously caused injury under today's expanded notion of "condition." Presumably to avoid reversal, it recited many of the canons of unseaworthiness law gleaned from prior Supreme Court decisions.²²⁰

The Third Circuit affirmed in a per curiam opinion, stating that: "[T]he findings of fact by the trial court that the vessel and its equipment were in a seaworthy condition at all times throughout the loading operations and that the accident was caused solely by the negli-

217. *Id.* at 358.

218. *Id.* at 364 (emphasis added).

219. *Id.* at 364-65.

220. *Id.* at 363:
Conclusions of Law

2. A longshoreman injured while engaged in loading a vessel, the work traditionally performed by the crew, is entitled to recover for either negligence or unseaworthiness.

4. Seaworthiness, a species of liability without fault, imposes a duty upon the shipowner to furnish a vessel and appurtenances reasonably fit for their intended use. This does not mean that a shipowner is an insurer or that he must furnish an accident-free ship. The ship need not be able to weather every storm, only that she be reasonably fit for her intended use.

5. The doctrine of unseaworthiness is not dependent upon actual or constructive knowledge of the shipowner nor of the merely temporary nature of the unseaworthy condition. An unseaworthy condition may arise from defective gear, appurtenance in disrepair, unfit crew, method of loading her cargo, or the method of storage.

gent operation of the stevedoring crew as stated in finding of fact #35, are not clearly erroneous."²²¹ The Third Circuit's opinion is somewhat puzzling. It had seemed apparent from its decisions in *Thompson v. Calmar Steamship Corporation*²²² and *Ferrante v. Swedish American Lines*²²³ that the Third Circuit had discarded the instant unseaworthiness doctrine and would require that a ship be tested by a trier of fact for reasonable fitness even if injury were occasioned instantaneously by an act on an otherwise seaworthy ship. The circuit's *Mascuilli* opinion is ambiguous. It can be taken as meaning that the *Mascuilli* facts could support a finding of seaworthiness, reasonable fitness, even accepting the negligent acts as potentially unseaworthy though instantaneously causing injury. It can also be interpreted as meaning that the previous Third Circuit cases did not discard the act-condition distinction completely but merely allowed unseaworthiness to be found, as the facts permitted, not in acts instantaneously causing injury but rather in unsafe conditions embodied in equipment rendered unsafe by acts prior to injury or in unsafe methods of operation.

Even more puzzling is the Supreme Court's unexplained reversal in *Mascuilli*. The Court's decision is subject to a myriad of interpretations. Plaintiff's brief contained three grounds for a finding of unseaworthiness:

1. The safety devices on the winches were set in excess of the safety limits of the cargo handling gear, and, as in *Crumady*, the longshoremen brought the unseaworthy condition into play;
2. assuming that the equipment was proper, the negligent handling of the same by the longshoremen created a dangerous condition which rendered the vessel unseaworthy;
3. the longshoremen themselves were not equal in disposition and seamanship to men in the ordinary calling at the time of the accident and therefore the vessel was unseaworthy as in *Boudoin v. Lykes Bros. S.S. Corp.*²²⁴

Presumably plaintiff's second contention is that operational negligence alone may be unseaworthiness and that the district court erred in not realizing this. The Supreme Court's reversal has been interpreted by the Second Circuit, in a dictum in *Candiano v. Moore-McCormack Lines, Inc.*,²²⁵ as adopting this view. That court characterized the Supreme Court's *Mascuilli* holding as "apparently" discarding the instant unseaworthiness rule and allowing a ship to be found unseaworthy for injury caused by operational negligence alone. The *Candiano* court apparently based its opinion on what *United States Law*

221. *Mascuilli v. United States*, 358 F.2d 133 (3d Cir. 1966).

222. 331 F.2d 657 (3d Cir. 1964). See note 149 *supra*.

223. 331 F.2d 571 (3d Cir.), *cert. dismissed*, 379 U.S. 801 (1964). See note 149 *supra*.

224. Petitioner's Brief for Certiorari at 2, *Mascuilli v. United States*, 387 U.S. 237 (1967), as paraphrased in 14 LOYOLA L. REV. 174, 181 (1967-68). See also Note, *Unseaworthiness, Operational Negligence, and the Death of the Longshoremen's and Harbor Workers' Compensation Act*, 43 NOTRE DAME LAWYER 550, 563 (1968).

225. 382 F.2d 961 (2d Cir. 1967).

Week reported as the fundamental question before the Supreme Court: "Does dangerous condition caused by stevedore's negligent handling of proper equipment render vessel unseaworthy and its owner liable for resulting injuries?"²²⁶

The *Candiano* decision was followed on the same day by the Second Circuit's decision in *Alexander v. Bethlehem Steel Corp.*,²²⁷ in which the court affirmed a judgment based on a jury verdict of unseaworthiness, stating that the trial court had properly refused to instruct the jury to distinguish between operational negligence and unseaworthiness. In both *Candiano* and *Alexander*, unseaworthy conditions of equipment might have been found apart from operational negligence, but the Second Circuit decided that the questions of whether the condition had existed for an appreciable period of time before injury, as in *Candiano*, or whether the condition was distinguished from operational negligence, as in *Alexander*, were no longer relevant issues in unseaworthiness law in light of *Masculilli*.

The Fourth Circuit has also interpreted *Masculilli* as discarding the operational negligence-unseaworthiness distinction, rejecting the contention that the Supreme Court reversed, citing *Crumady* and *Mahnich*, merely because of a factual similarity between *Masculilli* and those cases.²²⁸ In its opinion in *Venable v. A/S Det Forenede Dampskibsselskab*,²²⁹ the Fourth Circuit also cited *Waldron v. Moore-McCormack Lines, Inc.*,²³⁰ as authority for the statement: "It is now settled that the negligent misuse of safe and sufficient equipment renders a vessel unseaworthy."²³¹ In *Venable* the court reversed a judgment based on a jury verdict of *no* unseaworthiness because of error in the trial court's instructions, which attempted to distinguish between operational negligence and unseaworthiness. The facts of the case, which involved spaces left between stowed hogsheads and a failure to provide dunnage to cover them, were such as to allow for a finding of an unseaworthy condition, apart from active negligence.

Despite this formidable authority supporting the view that *Masculilli* has discarded the act-condition distinction, the decision is subject to other interpretations. While denying defendant shipowner's motion for summary judgment on the ground that the facts were not sufficiently clear for decision without a trial, the United States District Court for the Eastern District of Louisiana stated in dictum in *Jackson v. S.S. King's Point*,²³² that the Supreme Court's *Masculilli* opinion could be interpreted as the Second Circuit has interpreted it or, more conservatively, as maintaining the act-condition distinction but extending "... unseaworthiness to its furthest possible limit so that unseaworthiness will be *presumed* to exist whenever there is any question at all as to whether or not a 'condition' caused the longshore-

226. *Id.* at 962, quoting 35 U.S.L.W. 3052 (U.S., July 26, 1966).

227. 382 F.2d 963 (2d Cir. 1967).

228. *Venable v. A/S Det Forenede Dampskibsselskab*, No. 11,799 (4th Cir., June 12, 1968).

229. *Id.*

230. 386 U.S. 724 (1967).

231. *Venable v. A/S Det Forenede Dampskibsselskab*, No. 11,799, at 6 (4th Cir., June 12, 1968).

232. 276 F. Supp. 451 (E.D. La. 1967).

man's injuries."²³³ The *Jackson* court declined to state that either interpretation was the correct holding of *Mascuilli* but did state that, though it disliked expanding the liability of innocent shipowners, either interpretation of *Mascuilli* would be preferable to the present state of the law, since the act-condition distinction causes unjust inconsistency and uncertainty.

A third possible interpretation of *Mascuilli* is that embodied in plaintiff's third argument for reversal — that the longshoremen were unfit themselves, rendering the vessel unseaworthy. This interpretation has been discredited by one commentator²³⁴ on what seem to be reasonable grounds. The Supreme Court cited as authority for its reversal the *Crumady* and *Mahnich* cases, both of which dealt with the fitness of equipment, not personnel, and failed to cite the *Boudoin* case which specifically dealt with unseaworthiness embodied in unfit personnel. Further, the district court's conclusion of law number 17, though it described the longshoreman crew as "'not equal in disposition and seamanship to the ordinary men in the calling' at the time the ninth tank was loaded,"²³⁵ was probably intended to indicate negligence and not unseaworthiness since the court elsewhere described at length, and favorably, the experience and qualifications of the crew.

Another possible interpretation is that the trial court failed to divorce a requirement of negligence from its decision of unseaworthiness. Whenever the district court, in its opinion, mentioned the instantaneous nature of the accident, it qualified its remarks by reference to the inability of the shipowner's representatives to act to correct the situation in so short a time. These remarks obviously correctly state the issue as to negligence but are irrelevant to unseaworthiness considerations under *Mitchell*. This interpretation, however, is probably not warranted. The Supreme Court did not cite *Mitchell* or *Waldron* in its opinion, which would have been likely if the failure to divorce negligence and unseaworthiness had been the ground for reversal. In addition, the district court evidenced in its conclusions of law that it realized that unseaworthiness liability does not depend on fault or notice.²³⁶

Another interpretation is that the Supreme Court reversed because the trial court failed to realize that under at least one interpretation of *Waldron* unseaworthiness may be found in bare acts when those acts are *pursuant to order*. The district court stated as a conclusion of law: "15. The accident was caused by a failure of the longshoremen to cooperate and comply with the proper loading procedure. The directions of the signalman were not followed or were improper. In the instant case, it was absolutely essential that all longshoremen act as a unit to insure the success of these operations."²³⁷ Thus the

233. *Id.* at 453. See Note, *Unseaworthiness, Operational Negligence, and the Death of the Longshoremen's and Harbor Workers' Compensation Act*, 43 NOTRE DAME LAWYER 550, 564-65 (1968).

234. 14 LOYOLA L. REV. 174, 183-84 (1967-68). See also 42 TUL. L. REV. 648, 651 (1968).

235. *Mascuilli v. United States*, 241 F. Supp. 354, 364 (E.D. Pa. 1965).

236. See note 220 *supra*.

237. *Mascuilli v. United States*, 241 F. Supp. 354, 364 (E.D. Pa. 1965).

district court failed to distinguish between whether the signalman's directions (orders) were proper, but not correctly followed, or were improper in themselves and caused injury when carried out. Under one interpretation of the Supreme Court's *Waldron* decision,²³⁸ the former possibility could not in itself be an unseaworthy condition but the latter could; thus it would seem that the trial court should have made a factual determination of this issue. This interpretation of *Mascuilli*, however, is probably not called for, since *Waldron* is not cited by the Supreme Court in its reversing opinion.

The last interpretation of *Mascuilli*, petitioner's first ground for reversal, is that the district court erred in not finding that, apart from operational negligence, an unseaworthy condition of equipment existed where the winches used were constructed in such a way that circuit breakers would not operate when the winches were paying out and/or the circuit breakers were improperly set so as not to operate even when the winches were winding in. The Third Circuit's opinion was phrased in terms of a conclusion that the district court's findings of fact were not clearly erroneous. The Supreme Court's reversal, then, can be interpreted as merely holding the district court's findings of fact to be clearly erroneous. Under this interpretation it would be argued that the *Crumady* and *Mahnich* cases were merely cited because of the factual similarity between the defects in equipment in those cases and the defects involved in *Mascuilli*. This interpretation has been favored by at least one commentator.²³⁹ It does seem that the district court was clearly in error when it held the condition of the circuit breakers irrelevant to the determination of the cause of injury. The court stated that the circuit breakers could have had no effect because the winch attached to the shackle which parted was in a paying out position at the time, a position in which the circuit breakers were not constructed to function. Clearly when the rig "tightlined," the tautness of the lines was caused by two winches working in opposite directions, and it was the other winch, *opposite* to the one attached to the shackle, which was winding in at the time of the accident and which should have stopped, had *its* circuit breaker been set properly.²⁴⁰ Perhaps the circuit breaker was in fact set properly, but certainly the district court was in error in dismissing this issue from consideration.

It would seem that on general principles of jurisprudence, this last interpretation of *Mascuilli* is the best. Under this interpretation, *Mascuilli* leaves the state of the law unchanged and does not overrule, by implication, the well-established act-condition distinction. The prevailing view, however, seems to be that *Mascuilli* stands for one of the broader propositions discussed above.

238. See notes 195-96 *supra* and accompanying text.

239. See 14 LOYOLA L. REV. 174 (1967-68). See also Note, *Unseaworthiness, Operational Negligence, and the Death of the Longshoremen's and Harbor Workers' Compensation Act*, 43 NOTRE DAME LAWYER 550 (1968); 42 TUL. L. REV. 648 (1968).

240. The court found as a fact that "... the after starboard vang was being heaved in at a greater rate of speed than the other vangs were being payed-out." 241 F. Supp. at 362.

CONCLUSION

The instant unseaworthiness doctrine is presumably still a part of the law of unseaworthiness. Indeed, it is probably the most important of the surviving rules which keep the shipowner from becoming an insurer of all injuries aboard his ship. The Supreme Court has stated that the seaworthiness of a vessel or part of a vessel is to be judged by its reasonable fitness for an intended use.²⁴¹ The Court has not seen fit to put specific limitations upon this test by fashioning specific rules for different types of factual situations, and it is submitted that the lower courts should follow the Court's lead in this regard. In the *Waldron* case, the Court struck down one such rule which rejected a finding of unseaworthiness in a case where too few men were used to do a job pursuant to order,²⁴² and apparently eliminated another which precluded a finding of unseaworthiness where an unsafe operation was performed pursuant to an order.²⁴³ It is apparent that the Court desires unseaworthiness to be decided, on a factual basis, merely by the flexible concept of reasonable fitness, tempered, perhaps, by a requirement that an unsafe *condition* be found.²⁴⁴ Even the requirement of a condition may be interpreted as inconsistent with the Supreme Court's history of striking down specific limitations placed, as a matter of law, on what may be found to be unreasonable unfitness of a vessel.

A legal system marked by freedom vested in the trier of fact, which is essentially the state of the law of unseaworthiness today,²⁴⁵ will necessarily produce opposite results in many cases which are seemingly indistinguishable on their facts. Such a system could not, however, result in any more confusion than has the instant unseaworthiness limitation.²⁴⁶ The *Waldron* case is another example of the view of a majority of the Supreme Court that seamen are to be liberally treated and that the lower courts are not to fashion rules which result in the question of reasonable fitness being withheld from the jury. It is submitted that despite the probable added burden on shipowners, the confusing instant unseaworthiness rule *should* be discarded. Although the removal of this specific limitation on the unseaworthiness doctrine is probably not *required* by *Waldron* or *Masculilli*, it would be consistent with the spirit of these cases and the recent trend which seems to foreshadow a rule under which a seaman will be able to have the issue of unseaworthiness submitted to the jury whenever any injury is caused in any manner around or aboard a ship and whenever reasonable men might differ as to the reasonable fitness of the ship.

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241. See notes 67, 120, 210 *supra* and accompanying text.

242. See p. 278 *supra*.

243. See notes 195-96 *supra* and accompanying text.

244. See notes 197-98, 213-40 *supra* and accompanying text.

245. See note 206 *supra* and accompanying text.

246. See notes 156-72 *supra* and accompanying text.